

No. 9327

United States

Circuit Court of Appeals

For the Ninth Circuit.

PAYNE FURNACE & SUPPLY COMPANY,  
INC., a corporation,

Appellant,

vs.

WILLIAMS-WALLACE COMPANY,  
a corporation,

Appellee.

Transcript of Record

In Three Volumes

VOLUME I

Pages 1 to 258

Upon Appeal from the District Court of the United  
States for the Northern District of  
California, Southern Division.

FILED

FEB 28 1940



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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern  
District of California, Southern Division  
In Equity No. 4062L  
Suit for Infringement of Stadtfeld Patent  
No. 2,013,193 .

WILLIAMS-WALLACE COMPANY,  
a corporation,  
Plaintiff,

vs.

PAYNE FURNACE & SUPPLY COMPANY,  
INC., a corporation,  
Defendant.

BILL OF COMPLAINT

The plaintiff, Williams-Wallace Company, for its  
Bill of Complaint alleges:

## I.

That Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business in San Francisco, California.

## II.

That defendant is a corporation organized and existing under the laws of the State of California, having a regular and [1\*] established place of business in San Francisco, California, within the Northern District of California, Southern Division, where it has committed acts of infringement.

## III.

That the jurisdiction of the Court depends upon the patent laws of the United States.

## IV.

That heretofore, to-wit, on and prior to the third day of November, 1934, Jacob A. Stadtfeld was the true, original, and first inventor of certain new and useful improvements in Composite Pipe Construction, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his hereinafter recited application for Letters Patent therefor, and not in public use or on sale in this country for more than two years prior to his

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\*Page numbering appearing at foot of page of original certified Transcript of Record.



said application, and for which no application for Letters Patent in any country foreign to the United States of America had been filed more than twelve months prior to the filing of the application in this country, and which had not been abandoned.

#### V.

That thereafter, to-wit, on November 3, 1934, Jacob A. Stadtfeld filed an application in the Patent Office of the United States, praying for the issuance to him of Letters Patent of the United States for said invention, and such proceedings were had and taken in the matter of said application, and thereafter, to-wit, September 3, 1935, Letters Patent of the United States dated on said last-named day and numbered 2,013,193, were granted, issued, and delivered to plaintiff by the Government of the United States [2] for said invention, which said Letters Patent were issued under the seal of the Patent Office of the United States and signed by the Commissioner of Patents, whereby there was granted to the plaintiff, his heirs and assigns, for the term of seventeen years from September 3, 1935, the exclusive right to make, use and vend the said invention described and claimed in said patent, throughout the United States of America and the territories thereof, as will more fully appear from the Letters Patent or a duly certified copy thereof, ready to be produced as this Court shall direct.

## VI.

That Plaintiff is the owner of all right, title and interest in and to the aforesaid invention, and in and to the aforesaid Letters Patent by reason of an Assignment dated October 26, 1934, recorded July 20, 1935 in Liber V-163, p. 592, in the United States Patent Office, from Jacob A. Stadtfeld to Williams-Wallace Company, all of which will more fully appear by said Assignment or duly certified copies thereof in court to be produced; and all of which is evidenced by the notation on the original patent as issued by the United States Patent Office on September 3, 1935.

## VII.

That the said invention patented as aforesaid is of great value and utility to Plaintiff, and to the public generally; that the Plaintiff has caused to be manufactured and sold great numbers of said devices embodying the invention of said Letters Patent; that Plaintiff has expended large sums of money causing the said invention to be developed, and has built up a large and profitable business for the exploitation of said devices, so that the said invention and patent rights have been and are of great utility and value to the Plaintiff, and, by certain unlawful acts [3] of the Defendant herein complained of, would have been of greater value and profit to it.

## VIII.

That the devices caused to be manufactured and sold by Plaintiff, embodying the invention of the

aforesaid Letters Patent, have been and are duly marked "Patented", all in the manner prescribed by the Statutes of the United States; and Plaintiff's ownership of said invention and Letters Patent has been widely recognized and acquiesced in by the public and by the trade generally.

### IX.

That, well knowing the premises, and with intent to injure and defraud the Plaintiff, the Defendant has since the grant of said letters patent, and within six years prior to the filing of this Bill of Complaint, and within the Northern District of California, and elsewhere within the United States, infringed upon said Letters Patent by making and/or selling and/or using devices embodying the invention of said Letters Patent, which said devices infringed and infringe upon said Letters Patent and each and all of the claims thereof, by making and/or selling devices embodying the invention of said Letters Patent and of the several claims thereof, all without the license or consent of plaintiff and in defiance of Plaintiff's rights, and threatens to continue to so infringe, all to the great and irreparable damage of the plaintiff and to the unlawful gain and profit of the defendant, and that the exact amount of such damages and profits is unknown to plaintiff and can be ascertained only by an accounting.

Wherefore, Plaintiff prays a decree of this court against the defendant, as follows:

First: That upon the final hearing, Defendant, its servants, agents, attorneys, and employees, be permanently and finally [4] enjoined and restrained from making, using or selling any device, machine, or apparatus which infringes upon said Letters Patent Number 2,013,193, in violation of Plaintiff's rights as aforesaid, and that a writ of injunction be issued out of and under the seal of this court enjoining the said defendant, its agents, servants, attorneys and employees, as aforesaid.

Second: That Plaintiff have and recover from the defendant the profits realized by the Defendant and the damages sustained by the Plaintiff from and by reason of the infringement aforesaid, together with costs of suit, and that Plaintiff have such other and further relief as to the court may seem proper and in accordance with equity and good conscience.

WILLIAMS-WALLACE COMPANY,  
By A. DONHAM OWEN

Its Attorney

[Endorsed]: Filed Jul. 27, 1936. [5]

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated by and between the parties to the above entitled action, through their respective attorneys, subject to the approval of the Court, that in the proceedings and on the trial of the above

entitled cause uncertified printed copies of Letters Patent of the United States (and photostatic copies of foreign Letters Patent), furnished by the United States Patent Office, shall be received in evidence with the same force and effect as those duly certified or exemplified, and subject only to their admissibility under the pleadings, and relevancy and materiality as to the issues, and subject to correction, if any errors appear therein, by the production of duly certified or exemplified copies, and that the recitals appearing upon such copies of Letters Patent, stating the dates upon which applications therefor were filed and the respective patents issued, shall be received as prima facie evidence of the facts so recited, subject to correction by reference to certified or exemplified copies, if any errors appear therein.

Dated at San Francisco, California, this 3rd day of September, 1936.

A. DONHAM OWEN

Attorney for Plaintiff

WM. L. CONNOR

Attorney for Defendant

[Endorsed]: Filed Sept. 4, 1936. [6]

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[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

Comes now Plaintiff above-named, and files the following Interrogatories for discovery of the oppo-

site party of facts material to the evidence of the present cause. [7]

Interrogatory No. 1.

Did you, on or about the 11th of September, 1935, receive written notice, sent on behalf of Plaintiff above-named, charging you with infringement of patent No. 2,013,193, being the patent in suit herein?

Interrogatory No. 2.

Subsequent to September 3, 1935, and prior to the commencement of this suit, did you, within the Northern District of California, make, use and sell composite pipe constructions of the type having an outer tube, one or more layers of insulating material located around the inside surface of the said tube, and an inner tube slidably located inside the insulating material?

Interrogatory No. 3.

Subsequent to September 3, 1935, and prior to the commencement of this suit, did you, within the Northern District of California, make, use and sell composite pipe constructions of the type having an outer tube, a layer of insulating material formed into a tube and positioned inside the outer tube with its outside surface in contact with the inner surface of the outer tube, and an inner tube slidably positioned inside the tube of insulating material with

its outer surface in contact with the inner surface of the said tube of insulating material?

Interrogatory No. 4.

Subsequent to September 3, 1935, and prior to the commencement of this suit, did you, within the Northern District of California, make, use and sell composite pipe constructions of the type having an inner core pipe, an external pipe spaced from [8] the inner pipe, and insulating material interposed between the two pipes, the said pipes being telescopically arranged with respect to one another?

[9]

\* \* \* \* \*

[Endorsed]: Filed Oct. 5, 1936. [12]

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[Title of District Court and Cause.]

DEFENDANT'S ANSWERS TO CERTAIN OF  
PLAINTIFF'S INTERROGATORIES

Comes now the above-named defendant corporation, Payne Furnace and Supply Company, Inc., by Ruby M. Sorber, Secretary, and submits the following answers to certain of Plaintiff's Interrogatories filed herein October 5, 1936, which have not been heretofore objected to.

Interrogatory No. 1—Yes.

Interrogatory No. 2—Has sold but has not made nor used.

Interrogatory No. 3—Has sold but has not made nor used.

Interrogatory No. 4—Has sold but has not made nor used. [13]

\* \* \* \* \*

[Endorsed]: Filed Oct 31, 1936. [16]

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[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO  
PLAINTIFF BY DEFENDANT

Comes now the above-named defendant corporation, Payne Furnace and Supply Company, Inc., and, pursuant to Equity Rule 58, propounds the following interrogatories to plaintiff for the discovery of facts and documents material to the defense of the cause, to be answered under oath by an officer of the plaintiff corporation having knowledge of the facts.

Interrogatory No. 1

What claim or claims of the patent in suit will plaintiff rely upon on the trial of this case?

Interrogatory No. 2

What date of conception of the subject-matter of the claims of the patent in suit will plaintiff rely upon on the trial of this case?

Interrogatory No. 3

What is the earliest date of disclosure of the subject-matter of the claims of the patent in suit plaintiff will rely upon on the trial of this case?



Interrogatory No. 4

What is the earliest date of the first written description [17] of the subject-matter of the claims of the patent in suit plaintiff will rely upon on the trial of this case?

Interrogatory No. 5

What is the date of the first reduction to practice of the subject-matter of the claims of the patent in suit plaintiff will rely upon on the trial of this case?

Interrogatory No. 6

What is the date of the first public use or sale of devices embodying the subject-matter of the claims of the patent in suit plaintiff will rely upon on the trial of this case?

Interrogatory No. 7

Did plaintiff print and distribute or cause to be printed and distributed the circular attached hereto marked Exhibit "A"?

Interrogatory No. 8

Did plaintiff print and distribute or cause to be printed and distributed the circular attached hereto marked Exhibit "B"?

Interrogatory No. 9

Attach to your answers to these interrogatories a true copy of the assignment referred to in paragraph VI of the bill of complaint.

## Interrogatory No. 10

Is there in existence any writing or agreement between Jacob A. Stadtfeld, or anyone claiming under him, and plaintiff, which in any way qualifies or lessens plaintiff's title to the patent in suit, as alleged in paragraph VI of the bill of complaint, and, if so, attach a true copy or copies of same to your answers to these interrogatories.

## Interrogatory No. 11

Has plaintiff ever manufactured or sold a vent pipe made in accordance with any of the claims of the patent in suit which plaintiff will rely upon on the trial of this case? [18]

## Interrogatory No. 12

If the answer to Interrogatory No. 11 is in the affirmative, does plaintiff now manufacture or sell a vent pipe made in accordance with any of the claims of the patent in suit which plaintiff will rely upon on the trial of this case?

## Interrogatory No. 13

If the answer to Interrogatory No. 11 is in the affirmative and the answer to Interrogatory No. 12 in the negative, when did plaintiff cease to manufacture or sell such vent pipe?

PAYNE FURNACE AND  
SUPPLY COMPANY, INC.

By WM. L. CONNOR

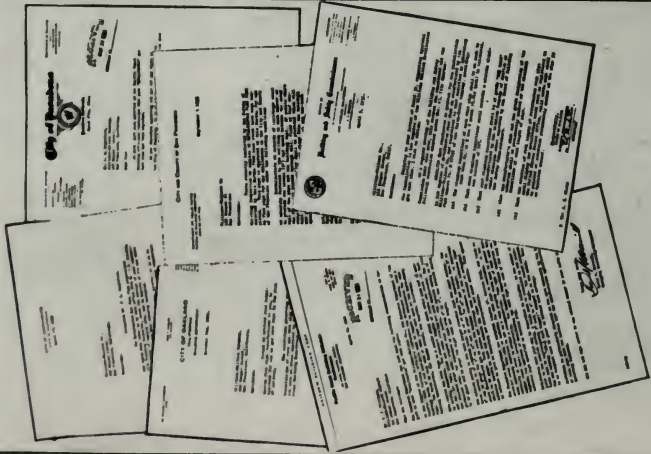
Solicitor and Counsel

Dated at Los Angeles, California, this 3rd day of November, 1936.

[Endorsed]: Filed Nov. 5, 1936. [19]

# APPROVED!

Based on the results of numerous tests and investigation of existing installations, Building Inspection Departments and gas engineers in all sections of the country have approved and recommended METALBESTOS for venting all types of gas appliances. A few reproductions of letters of approval are shown below and we wish to stress the point that our claims as to the DURABILITY, EFFICIENCY and SAFETY of METALBESTOS must be well founded in face of its general and wholehearted acceptance.



Copies of Letters of Approval or Installation Specific

# METALBESTOS

PRICE LIST

SIZES	METALBESTOS FOUND PIPE and FITTINGS						
	3"	4"	5"	6"	7"	8"	10"
PIPE	Per Ft. \$ 3.34	\$ 3.31	\$ 3.44	\$ 3.79	\$ 3.77	\$ 3.97	\$ 4.48
ANGLES-45°	Each 1.10	1.25	1.40	1.55	1.80	1.95	2.45
" 90°	" 1.25	1.40	1.55	1.80	2.05	2.25	4.50
TEES	" 1.45	1.75	2.25	2.75	3.25	3.90	4.25
TEE DRIP CAPS	" .30	.25	.30	.35	.45	.55	.65
REDUCERS	" 1.10	1.10	1.25	1.35	1.55	1.65	2.25
VENTILATOR TOPS	" 1.50	1.65	2.25	2.60	3.15	4.10	5.25
MASTER "A" TOPS	" 1.25	1.50	1.80	2.15	2.75	3.30	4.18
STANDARD "A" TOPS	" 1.50	1.65	2.25	2.60	3.15	4.10	5.25
CONNECTORS	Set .25	.25	.25	.25	.40	.50	.60
Ventilated Wall Thimble	1.50	1.25	1.50	1.75	2.25	2.75	3.50
WALL BRACKETS	Each .35	.40	.45	.50	.55	.65	.70
EXTRA SPACERS	" .04	.05	.10	.12	.15	.18	.24

RECTANGULAR SIZES	METALBESTOS RECTANGULAR PIPE and FITTINGS			
	2 1/2" x 3 1/2"	2 1/2" x 4 1/2"	2 1/2" x 5 1/2"	2 1/2" x 11 1/2"
EQUIVALENT ROUND SIZES	1"	3"	4"	5"
PIPE*	Per Ft. \$ .50	\$ .70	\$ .80	\$ 1.25
FLAT ANGLES-45°	Each 1.45	2.25	2.60	3.20
" 90°	" 2.25	2.60	3.00	3.35
SIDE ANGLES-45°	" 1.50	1.85	2.25	2.60
" 90°	" 1.85	2.25	2.60	3.20
TEES	" 2.25	2.60	3.00	3.35
TEE DRIP CAPS	" .45	.50	.55	.60
ADAPTERS†	" 1.85	2.25	2.60	3.20
WALL BRACKETS	" .40	.45	.50	.55
EXTRA SPACERS	" .10	.12	.15	.18

\*Round and Rectangular Pipes furnished in either 3' or 10' lengths at prices listed. Sizes always refer to inner Aluminum pipes.  
 †Prices of reducers are for sizes listed to any smaller diameter, including vertical section. Smaller outlets furnished to desired at some price. Adapters are made from rectangular to round to correspond to dimensions of standard fittings.  
 All prices are F.O.B. San Francisco and subject to change without notice.

APPROXIMATE SHIPPING WEIGHTS — CRATED  
 (Based on 20% for Weight Increased)  
 Fittings — Per Dozen  
 Pipes — Per 100 Feet

SIZE	RECTANGULAR PIPE and FITTINGS						
	3"	4"	5"	6"	7"	8"	10"
PIPE	145	180	220	260	310	370	480
45° ELBOWS	19	24	30	36	49	60	80
90° ELBOWS — TOPS	24	32	40	50	62	74	110
REDUCERS	35	40	50	60	75	95	110
TEES	35	40	50	60	75	95	110

# METALBESTOS

"AIR INSULATED"

## GAS VENT PIPE and FITTINGS

U.S. PATENT NO. 2013193



MANUFACTURED SOLELY BY  
**WILLIAMS-WALLACE COMPANY**  
 148 HOOPER STREET  
 SAN FRANCISCO, CALIFORNIA

EXHIBIT 10-A



## QUESTIONS AND ANSWERS PERTAINING TO GAS VENTS AND FLUES

- 1-Q. Why is it important to vent gas appliances?  
**A.** To guard against sickness and death. The products of combustion contain carbon monoxide, a gas so poisonous that an atmosphere containing as low as .04% will cause serious illness and .3% will cause death.
- 2-Q. What causes the burnt gases to condense within a pipe or flue?  
**A.** A non-insulating type of pipe allows for rapid chilling of the combustion products due to their coming in almost direct contact with the cooler outside air and when the gases fall in temperature to the dewpoint and below, condensation takes place.
- 3-Q. What are the dew points of manufactured and natural gases?  
**A.** Manufactured—135° to 140° F., depending on kind.  
**A.** Natural—110° to 140° F., depending on source.
- 4-Q. How much condensate can be produced through complete condensing of the combustion products?  
**A.** As high as 11 gallons to the 1000 cu. ft. of natural gas consumed or about half that amount where a manufactured variety is used.
- 5-Q. Is this condensate destructive to materials used in flue and vent construction?  
**A.** It is to many, such as Portland cement, mortar, iron, steel and copper.
- 6-Q. Why?  
**A.** Because condensate contains sulfuric acid, sulfurous acid or other acids and the materials mentioned are not immune to its deteriorating action.
- 7-Q. Besides minimizing condensation, are there any other reasons why it is important to insulate pipes used for venting gas appliances?  
**A.** Decidedly so. Unless a pipe is sufficiently insulated, a fire hazard exists when it is close to or in contact with combustible materials, as inside pipe temperatures sometimes exceed 800° F. Another important reason is that if the burnt gases are allowed to cool to the point where they start condensing, they become too heavily laden with moisture to rise and thus draft is retarded or eliminated.
- 8-Q. Is there a hazard of any kind when proper draft cannot be established?  
**A.** Yes. Unless the combustion products are allowed to flow freely to the outer air, a slight down pressure will cause back-draft. This may result in the extinguishing of pilot or burner flame, back the raw or burnt gases into habitable quarters or may cause the accumulation of raw gas in a confined space where it may explode through many forms of ignition.
- 9-Q. Summarizing the above, a gas vent or flue pipe must be unobstructed in order to allow it to perform satisfactorily. Is there any pipe on the market which has all the requisites of a perfect gas vent pipe?  
**A.** There is only one—METALBESTOS. Its inner PURE ALUMINUM pipe is unaffected by acid, its half inch circulating air space insulation insures cool outside pipe surfaces and keeps the products hot so that they flow quickly without condensing. Its outer galvanized steel casing insures rigidity and it will not crack or otherwise become distorted through settling of buildings or safe vibrations. METALBESTOS IS DURABLE. EFFICIENT, STANF AND EASY TO INSTALL.

## CONSTRUCTION and INSTALLATION DETAILS

THE CUT ON OPPOSITE PAGE ILLUSTRATES PIPE AND FITTINGS IN BOTH ROUND AND RECTANGULAR SHAPES AND ARE FULLY DESCRIBED BELOW:

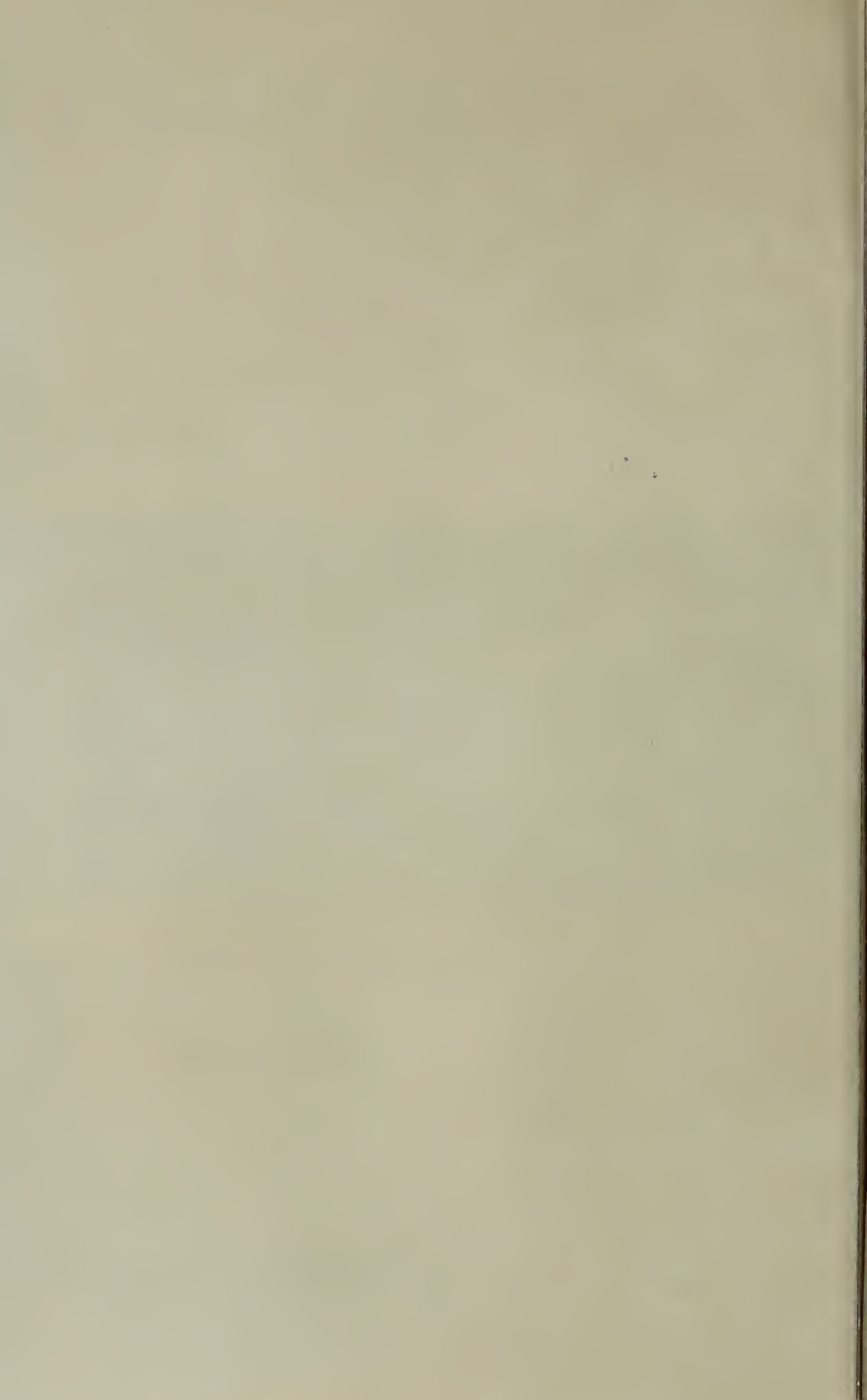
- 1  **Tee**—Show 10" and 3" lengths of pipe, the latter being cut away at both ends to show method of construction and assembly.  
**2**  **Tee**—Made of at least 99% PURE ALUMINUM and is not affected by acids contained in condensate. The outer casing is made of galvanized steel and in all cases is 1" larger in diameter than the inner pipe. The two pipes are assembled one within the other and held in centered position by means of vitrified asbestos spacer rings, as described below, which provides a 1/2" air space completely around the aluminum pipe. Pipes are crimped at opposite ends so that, with the male end of the aluminum pipe pointing down or toward the appliance and the male end of the galvanized pipe pointing up, the two pipes are completely sealed against back-drafting of gas.  
**3**  **Tee**—Made of malleable iron or steel. The male end of both the aluminum and galvanized pipes which about the spacer rings a lock is effected which allows the aluminum pipe to be pulled out at either end only far enough to facilitate joining. METALBESTOS is light and easily installed. It can be cut in the usual manner by use of a hack saw or pipe.

### METAL GAUGES ARE AS FOLLOWS:

ALUMINUM	—7" TO 6" INCLUSIVE—28 GAUGE
"	—OVER 6" —24 " "
GALVANIZED STEEL	—7" TO 6" INCLUSIVE—24 " "
"	—OVER 7" —24 " "

- 3  **Shows a 90° elbow cut away at one end to show construction and assembly. The inner aluminum pipe are made in one specially constructed length, the outer galvanized pipe is made in complete lengths joined to eliminate the possibility of leakage of condensate. Reversed male ends and general construction conform to pipe in all details. Made in both 90° and 45° angles.**
- 4  **Tee**—Made with extra long side outlet so that it will protrude through the average wall. Drip caps are made of aluminum and fit on crimped end of tee to form a drip ledge when desired.
- 5  **Connections**—Used for joining pipe which is cut on the job and crimped ends thereby eliminated. They are tapered so that one end fits over and the other end into the cut end, thus providing male and female ends corresponding to regular connections.
- 6  **Ventilator**—Used for venting gas from the appliance. Made of steel and adjustable for walls from 4" to 8" thick. They provide 2" pipe clearance.
- 7  **Ventilator and Master "A" Tops**—Made of heavy galvanized steel. Shields on vertical pieces prevent entrance of moisture in space between the two pipes but do not block off the air circulation.
- 8  **Spacer Rings**—Made of vitrified asbestos and are five sided or more in shape. They are 1/2" thick end, as illustrated by FIGURE 2, sufficient open space between the two pipes it provided for the free rise or flow of air. Extra spacer rings are obtainable for use in assembling cut pieces of pipe.
- 9  **Tee**—Made in both 3" and 10" lengths, in sizes as listed. The pipe features are embodied in its construction as pertain to round pipe.
- 10  **Tee** with long, round side outlet. Size of outlet corresponds in area to rectangular vertical piece, unless otherwise specified.
- 11  **Flat Elbow**—Made in both 90 and 45 angles.
- 12  **Side Elbow**—Made in both 90 and 45 angles.
- 13  **Adapter**—Used for breaking from rectangular pipe to round. Area of both ends are equivalent.





# METALBESTOS

## « « « GAS VENT PIPE » » »

P A T E N T E D  
NO. 2013193



EXHIBIT "B"  
Attached to Defendant's Interrogatories

MANUFACTURED BY  
**WILLIAMS - WALLACE COMPANY**  
SHEET METAL, STRIP AND WIRE PRODUCTS

160 HOOPER STREET

Phone HEMlock 0378

SAN FRANCISCO, CALIF.





# METALBESTOS GAS VENT PIPE

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DURABLE • SAFE • EFFICIENT • EASY TO INSTALL

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**METALBESTOS** is particularly made to meet the severe requirements which are demanded of a pipe for venting gas appliances. Its use insures long life, ideal draft conditions and safety from a fire hazard standpoint. It is not a pipe that is incidentally used for carrying off the products of combustion but is scientifically constructed to take care of every detail in connection with durability, safety and efficiency.

**DURABILITY** is insured through the use of pure Aluminum for the inner pipe which conveys the burnt gases. This metal, when not containing impurities in excess of 5% is immune to the action of sulfurous and sulfuric acid as contained in condensate from burnt gas. The Aluminum used in the manufacture of **METALBESTOS** is over 99% pure and is so resistant to the destructive action of condensate that its surface remains permanently bright and reflective.

**SAFETY** is an important factor and extensive tests and a constant check on existing installations which have been in use over a number of years, prove conclusively that the outer casing of **METALBESTOS** is cooler and consequently safer when in contact with combustible materials than any other type of commonly used gas vent pipe on the market. The circulating air in the space between the two pipes provides ideal insulation against conduction of the radiated heat from the inner Aluminum pipe to the outer casing. This type of construction was decided on after various insulating materials, which were practical for use between the walls of the two pipes, were tried and found to be inferior to the circulating air as a preventative against excessive heat loss through the outer casing. Rigid and leak-proof joints have bearing on the safety of **METALBESTOS** and its all metal construction eliminates the possibility of cracking or fracturing through constant vibrations, settling of buildings or careless handling.

**EFFICIENCY** concerns the appliance manufacturer, the installer and the property owner as, unless proper draft is attained, the gases become sluggish in their travel through cooling and condensing. This causes excessive dripping and sweating and the "backing up" of the products of combustion within the flue or vent to the extent that they exclude the proper intake of secondary air at the burner to allow for proper combustion. A floating flame results which is an indication of the production of carbon monoxide in excessive quantities and the failure of a flue or vent to carry off this poisonous gas may allow it to gain entrance into habitable quarters where it becomes a real menace to life and health. A floating flame is easily extinguished by slight down drafts and a double hazard therefore prevails when this condition is found.

**EASE OF INSTALLING** makes **METALBESTOS** the ideal pipe from this standpoint. Made in 3' or 10' lengths, it can be rapidly erected with a minimum of cutting. The long lengths greatly facilitate its erection under houses built close to the ground or vertically up the sides of buildings. It is exceedingly light and can easily be handled by one man for installing in either concealed or exposed places. Joints are readily made by merely pulling out the end of the Aluminum pipe at the male or crimped end which allows it to be easily inserted into the section of pipe or the fitting just ahead. The outer casing can then be slipped into place and joined as the two pipes are slidable with respect to each other. **METALBESTOS** should always be installed with the crimped end of the Aluminum pipe connecting to or pointing towards the appliance so that the reversed crimped end of the outer casing is pointing up or away. This insures connections which are leak-proof both inside and outside.

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SPECIFY OR INSTALL METALBESTOS TO INSURE PROPER APPLIANCE OPERATION

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**PRICE LIST**  
**METALBESTOS**  
**ROUND PIPE and FITTINGS**

SIZES		3"	4"	5"	6"	7"	8"	10"
PIPE*	Per Ft.	\$ .36	\$ .51	\$ .66	\$ .79	\$ .93	\$1.09	\$1.45
ANGLES-45°	Each	1.10	1.25	1.40	1.55	1.95	2.45	4.10
" -90°	"	1.25	1.40	1.55	1.80	2.25	2.85	4.50
TEES	"	1.65	1.95	2.25	2.70	3.20	3.90	4.25
TEE DRIP CAPS	"	.20	.25	.30	.35	.45	.55	.65
REDUCERS†	"		1.10	1.35	1.55	1.85	2.25	3.00
VENTILATOR TOPS	"	1.50	1.85	2.25	2.60	3.35	4.10	5.25
MASTER "A" TOPS	"	1.25	1.50	1.80	2.15	2.75	3.30	4.10
STANDARD "A" TOPS	"	1.50	1.85	2.25	2.60	3.35	4.10	5.25
CONNECTORS	Set	.25	.30	.35	.40	.50	.60	.75
WALL BRACKETS	Each	.35	.40	.45	.50	.55	.60	.70
EXTRA SPACERS	"	.06	.08	.10	.12	.15	.18	.24

**METALBESTOS**  
**RECTANGULAR PIPE and FITTINGS**

RECTANGULAR SIZES		2 1/4" x 3 1/4"	2 1/4" x 5 3/4"	2 1/4" x 9"	2 1/2" x 11 1/2"
EQUIVALENT ROUND SIZES		3"	4"	5"	6"
PIPE*	Per Ft.	\$ .50	\$ .70	\$ .88	\$1.05
FLAT ANGLES-45°	Each	1.85	2.25	2.60	3.00
" " -90°	"	2.25	2.60	3.00	3.35
SIDE ANGLES -45°	"	1.50	1.85	2.25	2.60
" " -90°	"	1.85	2.25	2.60	3.00
TEES■	"	2.25	2.60	3.00	3.35
TEE DRIP CAPS	"	.45	.50	.55	.60
ADAPTERS*	"	1.85	2.25	2.60	3.00
WALL BRACKETS	"	.40	.45	.50	.55
EXTRA SPACERS	"	.10	.12	.15	.18

\*Round and Rectangular Pipe furnished in either 3' or 10' lengths at prices listed.

†Prices of reducers are for sizes listed to any smaller diameter.

■Tees furnished with round side outlets of corresponding area to rectangular vertical section. Smaller outlets furnished if desired at same prices.

\*Adapters are made from rectangular to round to correspond to dimensions at head of columns.

All prices are F.O.B., San Francisco and are subject to change without notice.

Prices for sizes not listed or for special fittings will be furnished upon application.

MANUFACTURED BY

**WILLIAMS - WALLACE COMPANY**

160 HOOPER STREET

Phone HEmlock 0378

SAN FRANCISCO, CALIF.

BE SURE THE METALBESTOS TRADE MARK APPEARS ON ALL PIPE AND FITTINGS



[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO CERTAIN OF  
DEFENDANT'S INTERROGATORIES AND  
OBJECTIONS TO OTHERS THEREOF

Comes now the plaintiff, and in answer to Interrogatories propounded by defendant, and filed herein, submits the following answers and objections:

Int. No. 1: All the claims.

\* \* \* \* \*

Int. No. 7: Yes.

Int. No. 8: Yes.

Int. No. 9: Copy of Assignment is attached hereto and marked [24] "Plaintiff's Exhibit #2".

Int. No. 10: No.

Int. No. 11: Yes, in large quantities.

Int. No. 12: Yes.

Int. No. 13: No answer required.

The foregoing answers are made without prejudice to modification or correction should any error be found.

WILLIAMS-WALLACE COMPANY  
By R. F. WILLIAMS

President

State of California,  
City and County of San Francisco—ss.

R. F. Williams, being first duly sworn, deposes and says that he is President, of Williams-Wallace Company, the plaintiff above named; that he has

read the foregoing Plaintiff's Answers to Defendant's Interrogatories, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters he verily believes it to be true.

R. F. WILLIAMS

Subscribed and sworn to before me this 5th day of March, 1937.

[Seal]                      AGNES M. COLE

Notary Public in and for the City and County of  
San Francisco, State of California. [25]

PLAINTIFF'S EXHIBIT No. 2

Liber V163—Page 592.

ASSIGNMENT

Whereas, I, Jacob A. Stadtfeld, of the City and County of San Francisco, State of California, have invented a certain improvement in composite pipe constructions, for which I am about to make application for letters patent of the United States; and

Whereas, Williams-Wallace Company, a corporation organized and existing under and by virtue of the laws of the State of California, is desirous of acquiring the full and exclusive right therein;

Now, Therefore, in consideration of the sum of Ten (\$10.00) Dollars, the receipt of which is hereby acknowledged, I, Jacob A. Stadtfeld, by these pres-

ents, do sell, assign and transfer unto Williams-Wallace Company the full and exclusive right, for the territory of the United States, in and to the said invention, as described in specifications executed by me on the 26th day of October, 1934, preparatory to obtaining letters patent of the United States therefor; the said invention, application and letters patent to be held and enjoyed by the said Williams-Wallace Company for its interest for its own use and behoof and for its legal representatives, to the full end of the term for which said letters patent may be granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed this 26th day of October, 1934.

JACOB A. STADTFELD

Witnesses:

J. W. ROTH

WM. BRENNAN

Recorded. Transfers of Patents. US Patent Office. July 20, 1935. Liber V163 Page 592.

CONWAY P. COE

Commissioner of Patents.

[Endorsed]: Filed Mar. 8, 1937. [26]

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[Title of District Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

Now Comes the Plaintiff in the above-entitled suit, and by leave of Court first had and obtained,

files this, its Supplemental Bill of Complaint, whereby it alleges:

I.

That at all times hereinafter mentioned, Payne Furnace and Supply Company, Inc., was and is a corporation created under the laws of the State of California, on March 22, 1937, and has a place of business in the City and County of San Francisco, State [27] of California.

II.

That immediately subsequent to its organization, or on March 31, 1937, said Payne Furnace and Supply Co., Inc., acquired by transfer the business, assets, and good will owned by the predecessor corporation, Payne Furnace and Supply Company, Inc., the defendant named in the original Bill of Complaint, and assumed all of said predecessors' liabilities, and that said successor corporation, the defendant named herein, is now engaged in the sale and use of devices charged to infringe the Letters Patent in suit, without license or consent of plaintiff, and in infringement of said Letters Patent in suit in the City and County of San Francisco, State of California, and elsewhere.

III.

That plaintiff has requested said Payne Furnace and Supply Co., Inc., to cease and desist from further infringement upon said Letters Patent, and to account to plaintiff for damages and profits suf-



ferred through past infringement, but said Payne Furnace and Supply Co., Inc. has refused to comply with said request or any part thereof.

Wherefore, plaintiff prays that the said Payne Furnace and Supply Co., Inc., the successor corporation, be made a party defendant herein jointly with the Payne Furnace and Supply Company, Inc., the original defendant, and that the same relief asked for by the plaintiff in the Bill of Complaint against said predecessor corporation be awarded to plaintiff and against the said Payne Furnace and Supply Co., Inc., the successor corporation, which has assumed all of said predecessor's liabilities.

A. DONHAM OWEN

Solicitor and Counsel for Plaintiff

Service of the above notice is being made on counsel for defendant in Los Angeles by registered mail today as the defendant does not have a solicitor within this district upon whom service can be made.

[Endorsed]: Filed June 14, 1937. [28]

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[Title of District Court and Cause.]

FIRST AMENDED ANSWER AND  
COUNTER-CLAIM

Comes now the above-named defendant, Payne Furnace and Supply Company, by its attorney, and,

for answer to plaintiff's Bill of Complaint heretofore filed herein, admits, denies, and alleges as follows:

I.

Answering paragraph I of the Bill of Complaint, defendant admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business in San Francisco, California.

II.

Answering paragraph II of the Bill of Complaint, defendant admits that defendant is a corporation organized and existing under and by virtue of the laws of the State of California, and has a regular and established place of business in San Francisco, California, within the Northern District of California, Southern Division, but denies that said defendant has committed any acts of infringement, as alleged in the Bill of Complaint, either within the Northern District of California, Southern Division, or elsewhere. [29]

III.

Answering paragraph III of the Bill of Complaint, defendant admits that the jurisdiction of this Court depends upon the patent laws of the United States.

IV.

Answering paragraph IV of the Bill of Complaint, defendant is without knowledge and upon that ground denies that, on or prior to the 3rd

day of November, 1934, or at any other time, Jacob A. Stadtfeld was the true, original, or first inventor of any new or useful improvements in Composite Pipe Construction; denies that the said alleged invention was not known or used by others in this country before his alleged invention or discovery thereof; denies that the said alleged invention was not patented or described in any printed publication in this or any foreign country before his said alleged invention or discovery thereof, or more than two years prior to his alleged application for Letters Patent therefor; denies that the said alleged invention was not in public use or on sale in this country for more than two years prior to his said alleged application for Letters Patent; denies that no application for Letters Patent for and upon said alleged invention had been filed in any country foreign to the United States of America more than twelve months prior to the filing of the said alleged application in this country; and denies that said alleged invention has not been abandoned.

## V.

Answering paragraph V of the Bill of Complaint, defendant is without knowledge and upon that ground denies that on November 3, 1934, or at any time, Jacob A. Stadtfeld filed an application in the Patent Office of the United States praying for the issuance to him of Letters Patent of the United States for said alleged invention; denies that any

such proceedings were had or taken in the matter of said application or in accordance with the statutes [30] of the United States governing the grant and issuance of Letters Patent, that on September 3, 1935, or at any time, Letters Patent of the United States, on said last-named day, or any other day, numbered 2,013,193, or any other number, were granted, issued, or delivered to plaintiff by the Government of the United States for said alleged invention; denies that said alleged Letters Patent were issued under the seal of the Patent Office of the United States or were signed by the Commissioner of Patents; denies that there was granted to said Jacob A. Stadtfeld, or to plaintiff, its heirs or assigns, for the term of seventeen years from September 3, 1935, or for any term of years, any exclusive or other right to make, use, or vend the said alleged invention described or claimed in said alleged patent, throughout the United States of America or territories thereof or any part thereof, and defendant will require plaintiff to make strict proof thereof. And, in this connection, defendant demands oyer of plaintiff and requests the filing with the Clerk of this Honorable Court of the alleged original Letters Patent, or a duly certified copy thereof, and a certified copy of the alleged application for said alleged Letters Patent, and the subsequent proceedings thereon in the United States Patent Office.

## VI.

Answering paragraph VI of the Bill of Complaint, defendant is without knowledge and upon that ground denies that plaintiff is the owner of any right, title, or interest in or to the said alleged invention, or in or to the said alleged Letters Patent; denies that said alleged right, title, or interest in or to the said alleged invention, or in or to the said alleged Letters Patent, is by reason of an assignment from Jacob A. Stadtfeld to Williams-Wallace Company, dated October 26, 1934, or any other date, or recorded July 20, 1935, in Liber V-163, P. 592, in the United States Patent Office, or recorded in any other place, and defendant demands strict proof thereof, and, in this connection, defendant demands [31] oyer of plaintiff and requests the filing with the Clerk of this Honorable Court of a certified copy of the said alleged assignment.

## VII.

Answering paragraph VII of the Bill of Complaint, defendant is without knowledge and upon that ground denies that said alleged invention is of great or of any value or utility to plaintiff or any other person, or to the public generally, or otherwise; denies that plaintiff has caused to be manufactured or sold great or any numbers of said devices embodying the said alleged invention of said alleged Letters Patent; denies that plaintiff has expended large or any sums of money causing said

alleged invention to be developed, or has built up a large or profitable or any business for the exploitation of said alleged devices; denies that said alleged invention or said alleged patent rights have been or are of great or any utility or value to plaintiff; and denies that by reason of any acts of defendant or otherwise said alleged invention of said alleged Letters Patent would have been of greater or any value or profit to plaintiff.

### VIII.

Answering paragraph VIII of the Bill of Complaint, defendant is without knowledge and upon that ground denies that any of the alleged devices alleged to have been manufactured or sold by plaintiff, embodying the alleged invention of the said alleged Letters Patent, have been or are duly marked "Patented", in the manner prescribed by the Statutes of the United States, or otherwise; and denies that plaintiff's alleged ownership of said alleged invention and of said alleged Letters Patent has been at all recognized or acquiesced in by the public or by the trade generally, or at all.

### IX.

Answering paragraph IX of the Bill of Complaint, defendant denies that, well knowing the premises, or otherwise, or with [32] intent to injure or defraud plaintiff, or otherwise, defendant has, since the alleged grant of said alleged Letters Patent, or within six years of the filing of the Bill

of Complaint, or at any time, within the Northern District of California, or elsewhere within the United States, infringed upon said alleged Letters Patent, either by making or selling or using devices embodying the alleged invention of said alleged Letters Patent, or any devices, or that said alleged devices infringed or infringe upon said alleged Letters Patent, or any of the claims thereof, or by making or by selling devices embodying the alleged invention of said alleged Letters Patent, or of the several claims thereof, or without the license or consent of plaintiff, or in defiance of any of plaintiff's rights; defendant denies that it threatens to continue to infringe; denies that any acts of defendant are or have been to the great or irreparable or any damage of the plaintiff, or to the unlawful gain or profit, or to any gain or profit, of defendant; admits that the exact or any amount of such alleged damages or profits is unknown to plaintiff and can be ascertained only by an accounting.

Affirmative Defenses:

X.

Defendant is informed and believes and upon such information and belief avers that said Letters Patent 2,013,193, issued September 3, 1935, are void and of no effect, for the reason that said Jacob A. Stadtfeld is not the original or first inventor of the alleged invention sought to be claimed in and by said Letters Patent in suit, or any ma-

terial or substantial part thereof, but that prior to the alleged invention thereof by the said Jacob A. Stadtfeld, the subject matter sought to be claimed in and by said Letters Patent, and all material and substantial parts thereof, were invented, known to, and patented by others in this country, and that the names and residences of the said prior inventors and the numbers and dates of their patents are as follows: [33]

Patentee	Number	Date
J. M. Hammill	311,750	Feb. 3, 1885
LaFayette Aldrich	340,691	Apr. 27, 1886
Richard Savage	500,779	July 4, 1893
A. Harvey	534,473	Feb. 19, 1895
J. J. O'Toole	878,014	Feb. 4, 1908
J. M. Meade	1,428,294	Sep. 5, 1922
S. J. Welch	1,927,105	Sep. 19, 1933

and others whose names, and the numbers and dates of their patents, are at present unknown to this defendant, but which, when ascertained, it begs leave to insert in its answer by amendment hereto.

## XI.

Defendant is informed and believes and upon such information and belief alleges that said Letters Patent in suit are void and of no effect for the reason that, prior to the making of the purported invention sought to be claimed in and by the said Letters Patent, by the said Jacob A. Stadtfeld, and



more than two years prior to the filing of the application for said Letters Patent, the invention sought to be claimed in and by said Letters Patent, and all material and substantial parts thereof, were patented and shown and described in the following patents and printed publications:

Patentee	Number	Date
J. M. Hammill	311,750	Feb. 3, 1885
LaFayette Aldrich	340,691	Apr. 27, 1886
Richard Savage	500,779	July 4, 1893
A. Harvey	534,473	Feb. 19, 1895
J. J. O'Toole	878,014	Feb. 4, 1908
J. M. Meade	1,428,294	Sep. 5, 1922
S. J. Welch	1,927,105	Sep. 19, 1933

and others whose names, and the numbers and dates of their patents, are at present unknown to this defendant, but which, when ascertained, it begs leave to insert in its answer by amendment hereto. [34]

## XII.

Defendant is informed and believes and upon such information and belief alleges that said Letters Patent in suit are void and of no effect for the reason that, prior to the making of the purported invention by said Jacob A. Stadtfeld, and more than two years prior to the filing of the application for said Letters Patent, the invention sought to be claimed in and by said Letters Patent, and all material and substantial parts thereof, were known

to, in public use, and on sale in this country within the knowledge of the following named persons:

Sylvester T. Freiling, 84 Page Street, San Francisco, California, used at San Francisco, California;

George T. Gerhardt, 129 Howard Street, San Francisco, California, used at San Francisco, California;

George E. Augustine, 2107 West Santa Barbara Avenue, Los Angeles, California, used at Los Angeles, California;

A. J. Hartfield, 7615 Roseberry Avenue, Huntington Park, California, used at Los Angeles, California;

El Roy L. Payne, 338 North Foothill Road, Beverly Hills, California, used at Los Angeles, California;

Mrs. Etta Shearer, 4022 Third Avenue, Los Angeles, California, installed at same address;

Mrs. E. E. Evans, 6246 Santa Monica Boulevard, Los Angeles, California, installed at same address;

William J. Fox, 6238 Santa Monica Boulevard, Los Angeles, California, used at Los Angeles, California;

Louis S. Jacobs, 521 South Serrano Avenue, Los Angeles, California, used at Los Angeles, California;

Ben Baker, 2024 West 43rd Place, Los Angeles, California, installed at same address and other places in Los Angeles, California; Morris Faierman, 2522 Folsom Street, Los Angeles, California, installed at 513, 515 North Ficket Street, Los Angeles, California;

and also by others whose names and addresses are not now known to this defendant, but which, when ascertained, it begs leave to insert in its answer by amendment hereto. [35]

### XIII.

Defendant avers that, in view of the common public knowledge disclosed by the state of the art, both patented and unpatented, as it existed at the time of the making of the said alleged invention by said Jacob A. Stadtfeld, it did not require either invention or the exercise of the inventive faculty to produce, devise, construct, or use the purported invention of said Letters Patent in suit, sought to be patented in and by the claims thereof, but, on the contrary, it involved only mechanical skill, as it is known in the patent law, and the adaptation and utilization of what was common knowledge to those skilled in that particular art to produce, devise, construct, and use the subject matter of said Letters Patent, and accordingly said Letters Patent are void for want of invention.

## XIV.

Defendant is informed and believes and upon such information and belief avers that said Jacob A. Stadtfeld is not the original or first inventor of the purported invention sought to be claimed in and by the Letters Patent in suit, but that said Jacob A. Stadtfeld surreptitiously and unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting same.

## XV.

Defendant, further answering, avers that, while the application for said Letters Patent in suit was pending in the Patent Office of the United States, the applicant, Jacob A. Stadtfeld, by and for himself, and by and through his attorney, so limited and confined the claims of said application, by, under, and pursuant to the requirements of the Commissioner of Patents, and by the acquiescence in, rejection of, and cancellation of claims, both in view of the prior art and otherwise, and so admitted the limited scope of said purported invention, if, in fact, any invention had been made, [36] which is denied, that he cannot now seek to obtain a construction of the validity claims of said Letters Patent here in issue, or a construction sufficiently broad or of such scope as to include within the purview thereof any mechanisms or devices manufactured, used, or sold by this defendant, as alleged

or otherwise, all as will more fully and at large appear from a certified copy of the said application on which said Letters Patent issued, ready in Court to be produced.

XVI.

Defendant is informed and believes and therefore alleges that said alleged Letters Patent in suit are invalid and void because the alleged invention or discovery claimed therein was abandoned by said Jacob A. Stadtfeld by not applying for Letters Patent thereon within the time allowed by the statutes for the filing of such applications.

XVII.

Defendant is informed and believes and therefore alleges that the said Letters Patent in suit are null and void because the claims are not patentably distinct from each other.

XVIII.

Defendant, further answering, avers that said Letters Patent in suit are void and of no effect because the claims thereof are for a nonpatentable aggregation as distinguished from a patentable combination.

XIX.

Defendant, further answering, avers that the Commissioner of Patents exceeded his legal authority in granting the said alleged Letters Patent in suit and that the said Letters Patent in suit are null and void. [37]

## XX.

Defendant, further answering, avers that the plaintiff herein is estopped to maintain this suit against this defendant and is entitled to no recovery herein for the reason that defendant has a license and shop right to make, use, and sell vent pipe like that shown, described, and claimed in the patent in suit, without the payment of any royalty or other compensation therefor to anyone; that the facts on which said license and shop right are based are as follows, to-wit:

(a) That plaintiff's assignor and predecessor in interest in the said alleged invention, Jacob A. Stadtfeld, patentee of the patent in suit, No. 2,013,193, prior to the filing of his application in the United States Patent Office on which the said patent in suit issued, to-wit, on November 3, 1934, and prior to the making of any grant, assignment, or conveyance to plaintiff herein, or to anyone, of any right, title, or interest in or to the alleged invention covered by the said patent in suit, or in or to or under the said patent in suit, and while sole owner of all the alleged rights therein and thereto, well knowing that defendant was then and for many years past had been engaged in the business of developing, manufacturing, selling, and installing gas heating apparatus and equipment, in connection with which vent pipe is used, and had built up a large and profitable business therein, and had developed a large selling organization covering all parts of the United States in which such equip-

ment is used, and had spent large sums of money in widely advertising its products and that said products had become widely and favorably known to and used by the public, stated and represented to defendant, through its vice-president and general manager, El Roy L. Payne, that he had conceived a new type of vent pipe, to-wit, that shown and described in the patent in suit, and had found it to be very satisfactory, and further stated and represented to defendant, through said El Roy L. Payne, that he was [38] experienced in the manufacture and sale of vent pipe generally, and, knowing the nature and extent of defendant's business, repeatedly requested said El Roy L. Payne to have defendant enter upon the manufacture and sale of said vent pipe, for defendant's own benefit and for and on its own account, and further stated and represented to said El Roy L. Payne that if defendant would employ him, he, the said Stadtfeld, would be competent to and would supervise and direct the sale of said vent pipe for and on behalf of defendant.

(b) That as a result of the aforesaid statements, representations, and requests on the part of said Stadtfeld, and the said El Roy L. Payne having confidence in the honesty and integrity of said Stadtfeld and believing the said statements and representations, defendant was induced to and did commence and carry on the manufacture, sale, and distribution of said vent pipe, both during and since the time above stated, in both intrastate and

interstate commerce, including the Northern District of California, adopted and applied to said vent pipe the trade-mark "Metalbestos" to identify it as defendant's product and to distinguish it from other types of vent pipe then known and sold in the market, spent large sums of money for labor, materials, and special equipment to commence and carry on said manufacture and in advertising the said vent pipe under the trade-mark "Metalbestos" and in promoting the sale and use thereof as one of defendant's products, and did employ the said Stadtfeld at an agreed monthly salary to supervise and direct the sale and distribution of said vent pipe, and said Stadtfeld did enter into defendant's employ at an agreed monthly salary and did supervise and direct, under defendant's supervision, the sale and distribution of said vent pipe, for and on behalf of defendant, for a long period of time.

(c) That during said employment said Stadtfeld had full knowledge of the extent of the manufacture, sale, and wide distribution of said vent pipe by defendant, under the trade-mark "Metalbestos", [39] and of the large sums of money being expended by defendant for labor, materials, and special equipment to carry on said manufacture and in widely advertising the said vent pipe under the trademark "Metalbestos", as one of defendant's products, and in promoting the sale and use thereof.

(d) That defendant has continued to carry on the manufacture, sale, and distribution of said vent



pipe and has sold it in large quantities throughout the United States and elsewhere, as hereinbefore alleged, and said trade-mark acquired great value to defendant in identifying defendant's said vent pipe, except insofar as that value has been decreased by the conduct of plaintiff herein, as hereinafter alleged; that said Stadtfeld has never at any time denied defendant's right to make, use, or sell said vent pipe, has never requested or demanded that defendant discontinue the manufacture, use, sale, or distribution of said vent pipe, but, on the contrary, has always fully acquiesced in such manufacture, sale, and distribution, and has not at any time demanded a royalty or any other compensation therefor. [40]

\* \* \* \* \*

Wherefore, defendant, counter-claimant prays:

1. That the Bill of Complaint be dismissed with defendant's costs of suit and for such other or further relief as the Court may deem just. [51]

\* \* \* \* \*

PAYNE FURNACE AND  
SUPPLY COMPANY

By WM. L. CONNOR,

Its Attorney. [52]

State of California,  
County of Los Angeles—ss.

El Roy L. Payne, being by me first duly sworn, deposes and says: That he is the Vice-President

and General Manager of Payne Furnace and Supply Company, defendant and counter-claimant in the above entitled action; that he has read the foregoing Counter-Claim and knows the contents thereof; and that the same is true of his own knowledge, except to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

EL ROY L. PAYNE.

Subscribed and sworn to before me this 11th day of June, 1937.

[Seal] ANNETTE ADAMS,  
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within this 17th day of June, 1937.

A. DONHAM OWEN,  
Solicitor for Plaintiff.

[Endorsed]: Filed Jun. 18, 1937. [53]

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[Title of District Court and Cause.]

SUPPLEMENTAL INTERROGATORIES PRO-  
POUNDED TO PLAINTIFF BY DEFEND-  
ANT.

Comes now the above-named defendant corporation, Payne Furnace and Supply Company, and, pursuant to Equity Rule 58, propounds the following supplemental interrogatories to plaintiff for

the discovery of facts and documents material to the defense of the cause, to be answered under oath by an officer of the plaintiff corporation having knowledge of the facts.

Interrogatory No. 14

On or about what date did plaintiff first manufacture vent pipe made in accordance with the claims of the patent in suit?

Interrogatory No. 15

On or about what date did plaintiff first manufacture vent pipe made in accordance with the claims of the patent in suit as its own product?

Interrogatory No. 16

On or about what date did plaintiff first sell or distribute the vent pipe referred to in Interrogatory No. 14, and where and to whom was it sold?

Interrogatory No. 17

On or about what date did plaintiff first sell or distribute [54] vent pipe made in accordance with the claims of the patent in suit as its own product?

Interrogatory No. 18

Give the name and address of the person, firm, or corporation to whom the first sale referred to in Interrogatory No. 17 was made.

Interrogatory No. 19

Attach to your answers to these interrogatories a cut, drawing, or picture of the vent pipe referred

to in Interrogatories Nos. 15 and 17, and fully describe the construction of the same. [55]

\* \* \* \* \*

PAYNE FURNACE  
AND SUPPLY COMPANY

By WM. L. CONNOR,  
Solicitor and Counsel.

Dated at Los Angeles, California, this 15th day of June, 1937. [57]

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[Title of District Court and Cause.]

**ORDER**

The defendant above named having exhibited to the Court the attached supplemental interrogatories 14 to 37 to be answered by the plaintiff, Williams-Wallace Company, a corporation, and having applied to the Court for an order allowing the defendant to file such supplemental interrogatories to be answered by the plaintiff under oath by an officer thereof having knowledge of the facts,

It is therefore ordered that the said supplemental interrogatories be filed pursuant to Equity Rule 58 and that plaintiff, Williams-Wallace Company, a corporation, by an officer thereof having knowledge of the facts, answer said interrogatories under oath within fifteen (15) days from service thereof, unless it shall within ten (10) days after such ser-

vice file objections to said supplemental interrogatories.

HAROLD LOUDERBACK,

District Judge.

Dated this 18th day of June, 1937.

[Endorsed]: Filed June 18, 1937. [58]

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[Title of District Court and Cause.]

STIPULATION RE AMENDING ANSWER TO  
CORRECT NAME OF ORIGINAL CORPORATE  
DEFENDANT.

It Is Hereby Stipulated by and between the parties to the above-entitled cause, through their respective attorneys, subject to the approval of the court, that in the answer herein the title of the cause be amended by striking "Inc." from the name of [68] defendant, and in all other papers filed herein by defendant where the name of the original corporate defendant is given as Payne Furnace and Supply Company, Inc., a corporation, it shall be deemed to be Payne Furnace and Supply Company, a corporation.

Dated at San Francisco, California, this 18th day of August, 1937.

A. DONHAM OWEN,

Attorney for Plaintiff.

W. L. CONNOR,

Attorney for Defendants.

Approved this ..... day of August, 1937.

.....  
District Judge.

[Endorsed]: Filed Aug. 23, 1939. [69]

[Title of District Court and Cause.]

STIPULATION RE ANSWER OF DEFEN-  
DANT PAYNE FURNACE AND SUPPLY  
COMPANY, INC.

It Is Hereby Stipulated by and between the parties to the above-entitled cause, through their respective attorneys, subject to the approval of the court, that the first amended answer heretofore filed herein on the 18th day of June, 1937, for and on behalf [70] of defendant Payne Furnace and Supply Company, a corporation, shall be and is hereby adopted also as the answer of defendant Payne Furnace and Supply Company, Inc., a corporation, made a party to this suit by supplemental bill of complaint filed herein on the        day of June, 1937.

Dated at San Francisco, California, this 18th day of Aug., 1937.

A. DONHAM OWEN,

Attorney for Plaintiff.

W. L. CONNOR,

Attorney for Defendants.

Approved this ..... day of Aug., 1937.

.....  
District Judge.

[Endorsed]: Filed Aug. 23, 1937. [71]

[Title of District Court and Cause.]

STIPULATION RE AMENDING THE BILL OF  
COMPLAINT TO CORRECT NAME OF  
ORIGINAL CORPORATE DEFENDANT.

It Is Hereby Stipulated by and between the parties to the above-entitled cause, through their respective attorneys, subject to the approval of the court, that in the bill of complaint herein the title of the cause be amended by striking "Inc." from the name [72] of defendant, and in all other papers filed herein by plaintiff where the name of the original corporate defendant is given as Payne Furnace and Supply Company, Inc., a corporation, it shall be deemed to be Payne Furnace and Supply Company, a corporation, except that the name of the defendant corporation joined herein by plaintiff's supplemental bill of complaint filed herein on the ..... day of June, 1937, as successor to the original defendant, is correctly given as Payne Furnace and Supply Company, Inc.

Dated at San Francisco, California, this 18th day of August, 1937.

A. DONHAM OWEN,

Attorney for Plaintiff.

W. L. CONNOR,

Attorney for Defendants.

Approved this ..... day of August, 1937.

.....  
District Judge.

[Endorsed]: Filed Aug. 23, 1937. [73]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANTS'  
INTERROGATORIES NOS. 2 TO 6 INCLUSIVE

Comes now the Plaintiff and in answer to Interrogatories propounded by the Defendant filed herein submits the following answers:

Interrogatory No. 2—late summer, 1930.

Interrogatory No. 3—late summer, 1930.

Interrogatory No. 4—July 23, 1933.

Interrogatory No. 5—fall of 1930.

Interrogatory No. 6—November of 1933.

The foregoing answers are made on information or belief [74] and without prejudice to modification or correction should any error be found.

WILLIAMS-WALLACE COMPANY,

By R. F. WILLIAMS.

Dated: September 16, 1937.

State of California,

City and County of San Francisco—ss.

R. F. Williams, being first duly sworn, deposes and says that he is President of Williams-Wallace Company, the plaintiff above named; that he has read the foregoing Plaintiff's Answers to Defendant's Interrogatories, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters he verily believes it to be true.

R. F. WILLIAMS.



Subscribed and sworn to before me this 16th day of September, 1937.

[Seal] AGNES M. COLE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires October 18, 1938.

[Endorsed]: Filed Feb. 1, 1938. [75]

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[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANT'S  
INTERROGATORIES NOS. 14 TO 19 IN-  
CLUSIVE.

Comes now the Plaintiff, and in answer to the above Interrogatories propounded by the Defendant and filed herein, submits the following answers:

Inter. No. 14: June or July, 1933.

Inter. No. 15: November, 1933.

Inter. No. 16: November, 1933—Standard Asbestos Company.

Inter. No. 17: September 14, 1934.

Inter. No. 18: Richmond Sanitary Mfg. Co.

Inter. No. 19: Same as shown and described in the patent in suit. [82]

The foregoing answers are made without prejudice to modification or correction should any error be found.

WILLIAMS-WALLACE COMPANY,  
By R. F. WILLIAMS.

State of California,  
City and County of San Francisco—ss.

R. F. Williams, being first duly sworn, deposes and says that he is President of Williams-Wallace Company, the Plaintiff above-named; that he has read the foregoing Plaintiff's Answers to Defendant's Interrogatories Nos. 14 to 19 Inclusive, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters he verily believes it to be true.

R. F. WILLIAMS.

Subscribed and sworn to before me this 2nd day of February, 1938.

[Seal] JEAN WINTERMANN MINKS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires Oct. 16, 1938.

Service of a copy of the above paper is being made on counsel for Defendant in Los Angeles by mail today, as the Defendant does not have a solicitor within this district upon whom service can be made.

[Endorsed]: Filed Feb. 4, 1938. [83]

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District Court of the United States,  
Northern District of California  
Southern Division

At a stated term of the Southern Division of the  
United States District Court for the Northern Dis-

trict of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 16th day of May, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable Harold Louderback, District Judge.

[Title of Cause.]

This case having been submitted and fully considered, it is Ordered that a decree enter for the Plaintiff upon findings of fact and conclusions of law to be filed. [84]

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[Title of District Court and Cause.]

PLAINTIFF'S DRAFT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly to be heard in the above-entitled Court on March 1st, 1938, the hearing of said cause having been concluded on March 8th, 1938, and the parties having been represented by counsel; evidence having been offered by and on behalf of the parties and the cause having been argued and submitted to the Court, the Court having been fully advised in the premises upon consideration of the evidence and having theretofore, to-wit, on the 16th day of May, 1939, entered an Order announcing its decision and findings; now, in conformity [85] therewith, does make the following findings of fact:

1. The plaintiff, Williams-Wallace Company, is a corporation organized and existing under the laws of the State of California, having a place of business in San Francisco, California.

2. That the defendant, Payne Furnace & Supply Company, Inc., is a corporation organized and existing under the laws of the State of California and having a regular and established place of business in San Francisco, California.

3. This cause is a suit in equity arising under the patent laws of the United States.

4. Plaintiff, Williams-Wallace Company, is the owner of the entire right, title and interest in and to United States Letters Patent No. 2,013,193, granted September 3, 1935, to it as assignee of the inventor, Jacob A. Stadtfeld, and is also the owner of the entire right, title and interest in and to all causes of action for the infringement of said Letters Patent whenever and wheresoever committed.

5. That within six (6) years prior to the filing of the Bill of Complaint in this cause the defendant, Payne Furnace & Supply Company, Inc., did possess and sell in the City and County of San Francisco, within the Northern District of California, Southern Division, a composite pipe construction in evidence as Plaintiff's Exhibit 3.

6. Said composite pipe construction sold by defendant is admitted by it to come within the claims of the patent in suit so infringement is not an issue.

7. The claims of the patent in suit were narrowed in scope by qualifying disclaimers filed in the United States Patent Office on February 25, 1938, pursuant to U. S. Revised Statute Section 4917, when it appeared to plaintiff that through [86] inadvertence, accident or mistake their language was of undue breadth, and permitted an interpretation broader than was intended. Each limitation was taken directly from the specification of the patent as originally filed and each only modifies the three elements of the claims without adding new elements.

8. The claims, as narrowed in scope by the qualifying disclaimers, are not like any claim abandoned during prosecution of the application.

9. The claims, after disclaimer, as before, cover a single section of pipe and not a plurality of sections.

10. The claims, as narrowed in scope by the qualifying disclaimers, accurately describe the composite pipe construction sold by defendant.

11. Stadtfeld, the patentee of the patent in suit, was the first in the art to create a flue pipe structure containing the combination defined in each of the three claims in said patent.

12. The combinations defined respectively in claims 1, 2 and 3 of the Stadtfeld Patent No. 2,013,193 are each a substantial and meretorious advance over anything found in the art prior to such patent and each constitutes subject matter which required inventive genius to produce.

13. Each of the patents offered in evidence by the defendant as prior art with respect to the Stadtfeld Patent No. 2,013,193 fails to disclose one or more of the elements of the combinations respectively defined in the claims of said patent, or any equivalent thereof, and fails to show any prior invention, knowledge, use, or patenting of the combinations respectively defined in said claims.

14. Each of the alleged prior uses by Baker, Shearer, and Evans offered by the defendant as prior uses with respect to [87] the Stadtfeld patent No. 2,013,193 fails to disclose one or more of the elements of the combinations respectively defined in the claims of said patent, or any equivalent thereof; and fails to show any prior invention, knowledge, use or patenting of the combinations respectively defined in such claims.

15. None of the prior art structures shown in any of the defendant's exhibits contains or discloses a flue pipe made in relatively short sections, each section being composed of an inner and outer tube separated and supported concentrically by layers of insulating material and having the adjacent ends of these pipes with male and female construction with the male end of the inner tube pointing downwardly and the male end of the outer tube pointing upwardly and having the tube slidable so that when a plurality of sections are joined together, the inner joined sections are supported independently of the outer joined sections.

16. The flue pipe art is an old art, but the in-

vention of Stadtfeld set forth and claimed in Patent No. 2,013,193 is substantial and important. One of the principal merits of the invention is its simplicity. It was an arrangement of old elements which produced a new result. It has solved a problem of long standing in that art and has gone into wide and successful commercial use.

17. The manufacture and sale of the composite pipe construction in suit and the insistence by defendant to continue further manufacture and sale thereof constitutes irreparable injury to plaintiff, for which plaintiff has no plain, speedy, or adequate remedy except by injunctive relief.

18. That the composite flue pipe manufactured and sold by plaintiff, embodying the construction claimed in said Letters Patent has been duly marked "Patented", all in the manner [88] prescribed in Revised Statute Section 4900.

19. It is not shown that Stadtfeld surreptitiously and unjustly obtained the patent for that which was in fact invented by another who was using reasonable diligence in adapting and perfecting the same.

20. The invention of Stadtfeld was not abandoned by him by not applying for Letters Patent thereon within the time allowed by the statutes for the filing of such application. The application was filed within the two (2) year statutory period.

21. The claims are patentably distinct from each other and were so recognized by the Patent Office in granting them.

22. The claims do not call for an aggregation as distinguished from a patentable combination.

23. The Commissioner of Patents did not exceed his legal authority in granting the patent in suit.

24. Stadtfeld made the invention in the fall of 1932, made an experimental elbow in late 1932, and made the first samples of the straight pipe in February, 1933, while working for the Plant Rubber and Asbestos Company. None of these events occurred while Stadtfeld was in the employ of defendant, nor were any of the materials used paid for by defendant.

25. The flue pipe was first submitted to Plant Rubber and Asbestos Company in February, 1933, but was not adopted by them because they lacked the facilities for working in sheet metal.

26. On September 2, 1933, Stadtfeld made an arrangement with Harry A. Dutton, owner of the Standard Asbestos Company, whereby the latter took on the manufacture and sale of this flue pipe, and Stadtfeld agreed in writing to assign his invention and patent to Dutton (see Plaintiff's Exhibit 10). Stadtfeld then [89] entered Dutton's employ on a weekly salary.

27. Pursuant to that agreement the Standard Asbestos Company began the manufacture and sale of this flue pipe and subsequently coined and applied the trade mark "Metalbestos" to it.

28. The Standard Asbestos Company had the inner and outer metal pipes made for it by Wil-



liams-Wallace Company, plaintiff in this suit, and assembled the flue pipe in its own shop. This method of manufacture proved too costly and Standard Asbestos Company decided to manufacture no more Metalbestos. At this time they had on hand a manufactured stock amounting to about \$3500.00.

29. Mr. Dutton, manager and owner of the Standard Asbestos Company, terminated Mr. Stadtfeld's employment and told him that if someone would purchase all his stock of Metalbestos, completed and incomplete, worth approximately \$3500.00, he would turn over to the purchaser of the business his rights in Stadtfeld's invention and the trade mark "Metalbestos", and retire from this business.

30. Stadtfeld, then no longer in the employ of Standard Asbestos Company and seeking employment, went to Los Angeles in February, 1934, and interested the defendant company in taking on the manufacture of this flue pipe and purchasing a part of Mr. Dutton's stock, which at that time comprised about \$500.00 worth of aluminum stock and the balance in completed elbows and pipe amounting to approximately \$3500.00.

31. Defendant was told that Dutton owned all rights in the invention and owned the trade mark "Metalbestos", and that Dutton would transfer these to whoever would purchase his complete stock of Metalbestos so that he (Dutton) could retire from the Metalbestos business. Defendant sent Stadtfeld back to San Francisco to sell off Dut-

ton's stock so as to get the right to use the [90] invention and the Metalbestos trade mark, however, Dutton received no binding commitment from Payne. Dutton's offer stood only if Payne took all the stock, which Payne did not do.

32. Defendant entered upon the manufacture and sale of the patented device knowing that Dutton held all rights in the invention and the trade mark. Payne, in these dealings, understood Stadtfeld was not an agent or partner of Dutton's but was looking for employment for himself.

33. Dutton at no time ever agreed with Payne or anyone else to turn over his right to Stadtfeld's invention and to the trade mark "Metalbestos" unless all his stock was purchased so he could retire from the Metalbestos business.

34. Payne Furnace and Supply Company, Inc., the defendant, employed Stadtfeld, and ordered the plain aluminum stock, which Dutton shipped with reluctance because there was no assurance that defendant would take the \$3500.00 worth of completed Metalbestos stock. Subsequently, defendant purchased at one time \$269.00 worth of Dutton's completed Metalbestos stock; and later made other purchases, all of Payne's purchases totalling only about \$1000.00. The last Metalbestos purchased by defendant from Standard Asbestos Company was in June, 1934, and defendant received its stock of Aluminum from the East at about this date and began its own manufacture.

35. Dutton's requests to defendant and to defendant's San Francisco manager, Don Fleming, that defendant purchase the balance of Dutton's stock so he could retire and turn his rights over to them, went unheeded.

36. Dutton was forced to continue in the sale of Metalbestos products, using his trade mark "Metalbestos" thereon, having [91] still a large stock on hand.

37. When Stadtfeld entered the employ of defendant, the defendant immediately investigated the patentability of Stadtfeld's flue pipe and was told by its attorney early in April, 1934, that (Def. Ex. 12) "There is a possibility of securing a patent on your particular joint structure, but only a patent having extremely limited claims." This letter was shown to Stadtfeld.

38. Defendant at no time ever asked Stadtfeld for a license under his invention, nor did defendant ask Dutton for a license under the invention. At no time when defendant claims the license came into being did Stadtfeld have any interest, legal or equitable, in the title to his invention.

39. E. L. Payne, manager of defendant, in the exercise of his judgment, took the attitude that Stadtfeld had made no invention, and told Stadtfeld, "I would not want to waste my money" on it. Payne steered defendant's course on that basis, later admitting his error in judgment to Wallace, manager of plaintiff, saying that he had "slipped

up on getting the rights of Mr. Dutton". There was no change of position by defendant and no expenditure of money in producing the device for market in reliance on having a license, or any rights in the invention.

40. Defendant only bought from Dutton's stock what it absolutely needed, until it got into production in June or July, 1934.

41. Stadtfeld had gone to work for the defendant at a salary of \$150.00 monthly and had been "given to understand that something" would be worked out if a patent were secured.

42. Stadtfeld was penniless and had exhausted his funds during many years of experimenting with different flue pipes leading up to the perfection of the flue pipe of the patent in suit, [92] and was not in a position to finance an application for patent when Payne decided to ignore the invention and not take over Dutton's rights, in spite of the fact that Payne's attorney, Mr. Connor, had indicated that a limited patent might be obtained.

43. Stadtfeld for a time protested to defendant, but to no avail.

44. Stadtfeld, knowing that Payne had not taken over all of Mr. Dutton's stock so as to be entitled to Dutton's rights in the invention and the trade mark "Metalbestos", and knowing that Payne did not intend to secure a patent on his invention, resigned from Payne's employ on September 1, 1934, and returned to San Francisco to see if he

could interest some other manufacturer in Metalbestos.

45. Early in September, 1934, Stadtfeld called on Mr. Wallace, manager of plaintiff company, and told him that Payne had decided not to acquire the rights in the invention and trade mark "Metalbestos" from Mr. Dutton, and that these rights could be obtained from Mr. Dutton by plaintiff company.

46. Mr. Wallace verified these facts with Mr. Dutton, manager of Standard Asbestos Company, who at that time had left on hand about \$1500.00 worth of made up Metalbestos pipe and was still using his trade mark "Metalbestos" in selling flue pipe to the trade. At this time Mr. Dutton showed Mr. Wallace the agreement of September 2, 1933 (Plaintiff's Exhibit 10) from Stadtfeld agreeing to assign the Metalbestos invention to Mr. Dutton, and stated to Mr. Wallace that if plaintiff would take over his stock of Metalbestos and pay him an additional \$800.00 so he could get out of the business, plaintiff could have all Dutton's rights in Stadtfeld's invention and in Dutton's trade mark "Metalbestos". [93]

47. Williams-Wallace Company, plaintiff, was willing to recognize that Stadtfeld had made an invention and decided to accept Mr. Dutton's offer, agreeing orally to purchase the remaining stock of Metalbestos and in addition to pay Mr. Dutton the sum of \$800.00 to be deducted from royalties accru-

ing to Stadtfeld on any patent obtained for the invention.

48. Plaintiff immediately began the manufacture and sale of Metalbestos, having acquired from Standard Asbestos Company all rights in the invention and in the trade mark "Metalbestos".

49. Plaintiff, Williams-Wallace Company, promptly had prepared and filed an application for patent on Stadtfeld's invention, the rights in which it had acquired from Standard Asbestos Company. This eventuated in the patent in suit. An application for trade mark registration was also prepared and filed on the mark "Metalbestos".

50. Plaintiff, Williams-Wallace Company, also agreed orally with Stadtfeld to pay him a salary of \$35.00 a week and as soon as a patent issued on Metalbestos, to pay him a royalty of 25% of the net profit, and that out of the first \$1200.00 of this royalty, \$800.00 was to be paid to Standard Asbestos Company.

51. Defendant continued until the winter of 1934 to ignore the fact that Stadtfeld had made an invention, at which time Mr. E. L. Payne, manager of defendant company, came to plaintiff, Williams-Wallace Company, with a proposal to purchase the rights plaintiff had secured from Dutton under the invention and trade mark, but the offer made at this time was turned down by plaintiff. At this conference Mr. Payne was advised by plaintiff that as soon as the patent was secured, plaintiff would

expect defendant to cease manufacture and sale of the pipe in suit. [94]

52. On April 2, 1935, Williams-Wallace Company, without opposition from Payne Furnace & Supply Company, secured U. S. Trade Mark Registration No. 323,162 on the mark "Metalbestos". On April 23, 1935, notice of infringement of this registration was sent Payne Furnace & Supply Company.

53. On May 20, 1935, Payne Furnace & Supply Company wrote Williams-Wallace Company's attorney, Mr. J. E. Trabucco, relinquishing the use of the trade mark "Metalbestos" to Williams-Wallace Company (see Plaintiff's Exhibit 8).

54. In the spring of 1935, Mr. E. L. Payne, manager of defendant, called on Mr. Dutton with Mr. Donald D. Fleming to inquire of Mr. Dutton to make certain what Standard Asbestos Company had done with its rights in Mr. Stadtfeld's invention, confessing that he had not been particularly interested in the application for patent.

55. In May, 1935, before writing the letter of May 20, 1935 relinquishing the trade mark "Metalbestos", Mr. E. L. Payne again visited plaintiff, Williams-Wallace Company and admitted he "slipped up on getting the rights from Mr. Dutton" and again proposed that plaintiff sell these rights to defendant. This offer was turned down.

56. At no time has defendant abandoned the manufacture of the flue pipe shown in the patent

in suit, and adopted any of the prior art constructions.

57. That immediately upon issuance of the patent, defendant was notified in writing (September 10, 1935) of its infringement and was requested to cease and desist from further infringement.

From the foregoing Findings of Fact, the Court makes the following: [95]

### CONCLUSIONS OF LAW

1. Claims 1, 2, and 3 (with disclaimers) of Stadtfeld Patent No. 2,013,193, and each of them, are good and valid in law.

2. The manufacture and sale by defendant of the composite pipe shown in Plaintiff's Exhibit 3 is an infringement of the aforesaid claims of said patent.

3. Defendant does not have either a shopright, an implied license or an express license under said patent.

4. Plaintiff is entitled to injunctive and compensatory relief against the infringement herein, found.

Done in open court, this 12th day of June, 1939.

HAROLD LOUDERBACK

United States District Judge.

The foregoing suggested findings of fact and conclusions of law are lodged with the Court pursuant to Rule 42 of this Court. A copy was mailed to



counsel for defendant, William L. Connor, at his offices at 448 South Hill Street, Los Angeles, California, on this same day.

A. DONHAM OWEN.

Dated: May 25, 1939.

[Endorsed]: Filed Jun. 13, 1939. [96]

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In the United States District Court for the Northern District of California, Southern Division.

No. 4062-L.

WILLIAMS-WALLACE COMPANY, a corporation,

Plaintiff,

vs.

PAYNE FURNACE AND SUPPLY COMPANY,  
INC., a corporation,

Defendant.

### INTERLOCUTORY DECREE

This cause having come on to be heard upon the pleadings, proceedings and proofs herein taken and filed on behalf of both parties, and the Court having signed its Findings of Fact and Conclusions of Law herein, it is ordered, adjudged and decreed as follows:

1. That United States Letters Patent No. 2,013,193, granted September 3, 1935, to Williams-

Wallace Company, Plaintiff, as assignee of Jacob A. Stadtfeld, for Composite Pipe Construction, is good and valid in law as to claims 1, 2 and 3 thereof. [97]

2. That plaintiff, Williams-Wallace Company, is possessed of the full and entire right, title and interest in and to said Letters Patent, together with all rights of action for past infringement thereof.

3. That defendant, Payne Furnace & Supply Company, Inc., has infringed claims 1, 2 and 3 of said Letters Patent by making and selling the composite pipe exemplified by Plaintiff's Exhibit 3 herein.

4. That plaintiff, Williams-Wallace Company, recover of the defendant, Payne Furnace & Supply Company, Inc., the profits, gains and advantages which it, the said defendant, has received or made or which have arisen or accrued to it from the infringement aforesaid, together with the damages which the plaintiff has sustained by reason thereof; and that this case be referred to a Master of this Court to be appointed by this Court to take and state the amount of said gains and profits and assess such damages and to report thereon with all convenient speed; and that the defendant and its employees and agents are hereby directed and required to attend before said Master from time to time, as required, and to produce before him such books, papers, and documents as relate to the matter in issue, and to submit to such oral examination as the Master may require.

5. That a permanent injunction issue out of and under the seal of this Court against the said Payne Furnace & Supply Company, Inc., according to the prayer of the Bill, strictly enjoining and restraining it, its clerks, agents, attorneys, servants and workmen from directly or indirectly making, constructing, using, or selling composite pipe embodying the inventions described in said Letters Patent No. 2,013,193 and particularly specified in claims 1, 2 and 3 thereof, and specifically from directly or [98] indirectly making, using or selling, or causing to be made, used or sold defendant's composite pipe exemplified by Plaintiff's Exhibit 3 herein, and from in any way infringing upon any of said claims of said Letters Patent or upon the rights of the plaintiff under said claims.

6. That no costs be awarded to either party.

HAROLD LOUDERBACK,

United States District Judge.

Approved as to form as provided in rule 22:

.....  
Counsel for Defendant.

A. DONHAM OWEN,

Counsel for Plaintiff.

Dated: June 12, 1939.

[Endorsed]: Filed June 13, 1939. [99]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Plaintiff above named and to A. Donham Owen, Esq., Russ Building, San Francisco, California, its attorney.

You, and each of you, will please take notice that the above named defendant, Payne Furnace and Supply Co., Inc., does hereby appeal from the Interlocutory Decree filed and entered on the 13th day of June, 1939, in the above entitled matter, in favor of plaintiff and against this defendant, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

W. L. CONNOR,

Attorney for Defendant.

Dated at Los Angeles, California, this 11th day of July, 1939.

[Endorsed]: Filed Jul. 12, 1939. [100]

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know all men by these presents, that the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland and duly licensed to transact business in the State of California, is held and firmly bound unto the Williams-Wallace Company, a corporation, the plaintiff in the above entitled cause, in the sum of two hundred and fifty

dollars (\$250.00), to be paid to the said Williams-Wallace Company, its successors or assigns, for which payment well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 11th day of July, 1939, A. D. [101]

The condition of this obligation is such, that whereas the Payne Furnace and Supply Co., Inc., the defendant in the above entitled cause is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Interlocutory Decree of the United States District Court for the Northern District of California, Southern Division, made and entered on the 13th day of June, 1939.

Now, therefore, if the said appellant-defendant, Payne Furnace and Supply Co., Inc., prosecutes its said appeal to effect and answers all costs if it fails to make good its plea, or if the appeal is dismissed, or the judgment affirmed or modified, and if said appellant-defendant, Payne Furnace and Supply Co., Inc., shall satisfy all judgments in full together with all costs, interests and damages for delay, if, for any reason, the appeal is dismissed, or if the decree is affirmed or modified, then this obligation shall be void; otherwise it remains in full force and effect.

In witness whereof, the said Fidelity and Deposit Company of Maryland has hereto affixed its cor-

porate seal and acknowledged same by one of its duly authorized officers at Los Angeles, California, this 11th day of July, 1939.

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND

By W. H. CANTWELL,

Attorney-in-fact.

Attest:

[Seal]

S. M. SMITH,

Agent.

State of California,  
County of Los Angeles—ss.

On this 11th day of July in the year, 1939, before me, Theresa Fitzgibbon, a notary public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. H. Cantwell known to me to be the [102] Attorney-in-fact and S. M. Smith known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the corporation which executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and the official seal on the day and year in this certificate first above written.

[Seal]

THERESA FITZGIBBON,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 3, 1942.

[Endorsed]: Filed Jul. 12, 1939. [103]

United States Circuit Court of Appeals in and for  
the Ninth Circuit.

Undocketed

PAYNE FURNACE & SUPPLY COMPANY,  
INC., a corporation,

Defendant-Appellant,

vs.

WILLIAMS-WALLACE COMPANY, a corpora-  
tion,

Plaintiff-Appellee.

### ORDER

Upon motion of Lyon & Lyon, Frederick S. Lyon,  
Leonard S. Lyon and Reginald E. Caughey, attor-  
neys for the Defendant-Appellant, and upon the  
annexed Affidavit of Reginald E. Caughey;

It is hereby ordered:

That the time within which the record on appeal,  
as provided in Rules 75 and 76 of the Rules of  
Civil Procedure, shall be filed with the Appellate  
Court and the action there docketed is hereby ex-  
tended up to and including October 1, 1939.

Dated: This 21st day of August, 1939.

CURTIS D. WILBUR,

Senior U. S. Circuit Judge. [104]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF REGINALD E. CAUGHEY.

State of California,

County of Los Angeles—ss.

Reginald E. Caughey, being first duly sworn, deposes and says:

That he is a member of the firm of Lyon & Lyon and is one of the attorneys for the defendant-appellant in the above entitled case; that the firm of Lyon & Lyon and the members thereof have recently been substituted as attorneys for said defendant-appellant as shown by a copy of said Substitution of Attorneys annexed hereto.

That in order to properly prepare the record on appeal, it is necessary to examine the transcript of record exceeding four hundred (400) pages and a large number of documentary exhibits, including prior art patents and voluminous correspondence. That an extension of the time to docket said appeal is not being requested for the purpose of delay but in order to insure the rights of defendant-appellant will be given proper consideration and protection.

REGINALD E. CAUGHEY.

Subscribed and sworn to before me this 18th day of August, 1939.

[Seal] MEYER WEISMAN,  
Notary Public in and for the County and State  
above named.

[Endorsed]: Order, etc. Filed August 21, 1939.  
Paul P. O'Brien, Clerk. [105]



[Title of District Court and Cause.]

STIPULATION [106]

It is stipulated by and between counsel for the respective parties that the time within which the appeal in the above entitled case may be docketed with the Circuit Court of Appeals for the Ninth Circuit is extended up to and including October 10, 1939.

A. DONHAM OWEN,

Attorney for Plaintiff-Appellee.

LYON & LYON

REGINALD E. CAUGHEY,

Attorneys for Defendant-Appellant.

Dated: September 29th, 1939.

It is so ordered:

HAROLD LOUDERBACK,

District Judge.

[Endorsed]: Filed Sept. 30, 1939. [107]

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[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF THE RECORDS, PROCEEDINGS AND EVIDENCE.

It is stipulated by and between counsel for the respective parties that the Clerk of this Court, in conformance with Rule 75 of the Rules of Civil Procedure, shall transmit to the Clerk of the Circuit

Court of Appeals for the Ninth Circuit the following [108] ing designated portions of the records, proceedings and evidence in this cause, certifying those portions thereof that are necessary to be certified pursuant to said rules or pursuant to the Rules of said Circuit Court of Appeals; all of the costs thereof to be paid by the defendant-appellant, and the original Reporter's Transcript and Exhibits forwarded pursuant to Rule 75(i) shall be held by the Clerk of the Appellate Court pending the appeal, and thereafter returned to the Clerk of this Court:

- A. The original Reporter's Transcript of the Evidence and Proceedings taken at the trial of this cause.
- B. Copies of the following pleadings:
  1. Bill of Complaint.
  2. Stipulation admitting into evidence uncertified printed copies of patents.
  3. Plaintiff's Interrogatories and Order allowing same to be filed.
  4. Defendant's Answers to certain of Plaintiff's Interrogatories.
  5. Interrogatories propounded to Plaintiff by Defendant and Order thereon.
  6. Plaintiff's Answers to certain of Defendant's Interrogatories.
  7. Supplemental Bill of Complaint.
  8. Supplemental Interrogatories Propounded to Plaintiff by Defendant.

9. First Amended Answer and Counterclaim.
10. Notice of Motion and Order to take Depositions de bene esse.
11. Stipulation re. amending Bill of Complaint to correct name of original corporate defendant.
12. Stipulation re. amending Answer to correct name of original corporate defendant.
13. Stipulation re. Answer of Defendant, Payne Furnace & Supply Company, Inc.
14. Defendant's further Answers to certain of Plaintiff's Interrogatories.
15. Plaintiff's Answer to Defendant's Interrogatories 2 to 6, inclusive. [109]
16. Plaintiff's Answers to Defendant's Interrogatories 14 to 19, inclusive.
17. Order for Decree for Plaintiff upon filing of Findings of Fact and Conclusions of Law.
18. Findings of Fact and Conclusions of Law.
19. Interlocutory Decree.
20. Notice of Appeal.
21. Bond on Appeal.
22. Order Extending Time to Docket Appeal to October 1, 1939.
23. Substitution of Attorneys and Order thereon.
24. Stipulation Extending Time to Docket Appeal to October 10, 1939.
25. This Stipulation and Order.

- C. The following original Plaintiff's Exhibits:
1. Ex. 1—Copy of patent in suit.
  2. Ex. 1-A—Copy of Disclaimer.
  3. Ex. 3—Payne-A-Vent pipe (physical).
  4. Ex. 4—Base, Tee, Thimble, 2 sections of pipe made according to patent in suit (physical).
  5. Ex. 5—Payne-A-Gas Vent and Flue Pipe Bulletin.
  6. Ex. 6—Page 65 "Gas", Sept., 1936.
  7. Ex. 7—Page 34 "Gas", July, 1936.
  8. Ex. 8—Letter 5/20/35, to Trabucco from defendant.
  9. Ex. 9—Page 15 "Building Standard", July, 1936.
  10. Ex. 10—Agreement between Stadtfeld and Standard Asbestos Company.
  11. Ex. 11—Contract dated 8/1/35 between Stadtfeld and Plaintiff.
  12. Ex. 12—Trade mark 323162 (Metalbestos).
  13. Ex. 13-A—Letter 12/27/34, defendant to plaintiff.
  14. Ex. 13-B—Letter 1/2/35, Plaintiff to defendant.
  15. Ex. 14-A—Letter 4/6/34, Stadtfeld to Dutton
  16. Ex. 14-B—Letter 4/9/34, defendant to Dutton (same as Defts. Ex. 10-B-N).

17. Ex. 14-C—Letter 5/22/34, defendant to Dutton.
18. Ex. 14-D—Letter, Dutton to Stadtfeld 5/24/34.
19. Ex. 14-E—Letter, Dutton to Stadtfeld 5/25/34.
20. Ex. 14-F—Letter, defendant to Dutton 6/14/34.
21. Ex. 15—Invoice 8/27/34 of defendant to Dutton.
22. Ex. 16—Letter 6/11/35, Dutton to plaintiff.
23. Ex. 17—Office memorandum of plaintiff dated 2/10/33.
24. Ex. 18—Chart (physical). (Reduced photostat to be included in Book of Exhibits.)
25. Ex. 19-A—Transite flue pipe (physical.)
26. Ex. 19-B—Circular describing Transite flue pipe.
27. Ex. 20-A—Vitex flue pipe (physical).
28. Ex. 20-B—Circular describing Vitex flue pipe.
29. Ex. 21—Letter 7/12/33, Stadtfeld to Wright.
30. Ex. 22-A—Sample made in accordance with Meade invention (physical).
31. Ex. 22-B—Sample made in accordance with Meade invention (physical).

D. The following original Defendant's Exhibits:

1. Ex. 1—Depositions of Irwin C. Renisch, E. Albert Guenther, Ben Henry Baker, Etta Shearer, Albert E. Umbarger, E. Elsie Evans, and Exhibits A to G attached (G physical).
2. Ex. 2-A—Photographic reproduction of Exhibit G.
3. Ex. 2-B—Photographic reproduction of Exhibit G.
4. Ex. 3—Certified copy of file-wrapper and contents of application for patent in suit.
5. Exs. 4-A to 4-G, inclusive—Patents pleaded as anticipations.
6. Exs. 5-A to 5-K, inclusive—Prior art patents.
7. Exs. 6-A to 6-E, inclusive—Patents cited in prosecution of application.
8. Ex. 8—Certified copy Sec. 2 Ord. 37862 (N. S.) Los Angeles.
9. Ex. 9—Certified copy Sec. 82 and 85 $\frac{1}{2}$  Ord. 49,567, Los Angeles. [111]
10. Ex. 10-A—Letter 4/13/32.
11. Ex. 10-B—Letter 4/16/32.
12. Ex. 10-C—Letter 4/19/32.
13. Ex. 10-D—Letter 4/22/32.
14. Ex. 10-E—Letter 4/24/32.
15. Ex. 10-J—Letter 5/12/32.
16. Ex. 10-L—Letter 5/18/32.
17. Ex. 10-M—Letter 6/4/32.

18. Ex. 10-O—Letter 6/6/32.
19. Ex. 10-R—Letter 6/18/32.
20. Ex. 10-S—Letter 7/11/32.
21. Ex. 10-V—Letter 12/6/32.
22. Ex. 10-W—Letter 12/9/32.
23. Ex. 10-Z—Letter 2/6/33.
24. Ex. 10-AA—Letter 4/10/33.
25. Ex. 10-AE—Letter 5/8/33.
26. Ex. 10-AF—Letter 5/12/33.
27. Ex. 10-AG—Letter 6/6/33.
28. Ex. 10-AH—Letter 6/8/33.
29. Ex. 10-AI—Letter 6/9/33.
30. Ex. 10-AJ—Letter 6/14/33.
31. Ex. 10-AK—Letter 6/16/33.
32. Ex. 10-AL—Letter 6/19/33.
33. Ex. 10-AM—Letter June 23, 1933.
34. Ex. 10-AN—Letter 7/19/33.
35. Ex. 10-AO—Drawing attached to Exhibit 10-AN.
36. Ex. 10-AP—Letter 10/21/33.
37. Ex. 10-AQ—Letter 10/26/33.
38. Ex. 10-AR—Letter 11/3/33.
39. Ex. 10-AS—Letter 10/16/33.
40. Ex. 10-AT—Letter 11/8/33.
41. Ex. 10-AU—Letter 12/8/33, together with comparative heat tests attached thereto. [112]
42. Ex. 10-AV—Letter 2/22/34.
43. Ex. 10-AW—Letter 2/28/34.
44. Ex. 10-AX—Letter 3/2/34.
45. Ex. 10-AY—Letter 3/13/34.

46. Ex. 10-AZ—Letter 3/15/34.
47. Ex. 10-BD—Letter 3/24/34.
48. Ex. 10-BE—Letter 3/26/34.
49. Ex. 10-BG—Letter 3/27/34.
50. Ex. 10-BJ—Letter 4/2/34.
51. Ex. 10-BN—Remaining portion of plaintiff's inter-departmental correspondence (already in as Plffs. Ex. 14-B), said portion dated 4/9/34.
- 51<sup>1</sup>/<sub>2</sub>. Ex. 10-BW—Letter 9/6/34.
52. Ex. 10-BX—Letter 9/7/34.
53. Ex. 11—Correspondence with Lee Holtz re. Tests.
54. Ex. 12—Letter, Wm. L. Connor to defendant, 4/5/34.
55. Ex. 14-A—Pages 45 & 48 of "Western Gas"—June, 1934.
56. Ex. 14-B—Page 40 "Western Gas"—August, 1934.
57. Ex. 14-C—Page 55 "Western Gas"—September, 1934.
58. Ex. 14-D—Page 40 "Western Gas"—December, 1934.
59. Ex. 14-E—Page 40 "Western Gas"—January, 1935.
60. Ex. 14-F—Page 48 "Western Gas"—March, 1935.
61. Ex. 14-G—Page 48 "Western Gas"—April, 1935.
62. Ex. 15-A—Page 7 of Conference Bulletin—Aug., 1934.



63. Ex. 15-B—Page 15 of Conference Bulletin—Sept., 1934.
64. Ex. 15-C—Page 15 of Conference Bulletin—Oct., 1934.
65. Ex. 15-D—Page 9 of Conference Bulletin—Nov. & Dec., '34.
66. Ex. 15-E—Page 10 of Conference Bulletin—Jan. & Feb., '35.
67. Ex. 15-F—Page 9 of Conference Bulletin—Mar. & Apr., '35.
68. Ex. 15-G—Page 14 of Conference Bulletin—May, 1935.
69. Ex. 15-H—Page 12 of Conference Bulletin, June, 1935. [113]
70. Ex. 15-I—Page 12 of Conference Bulletin, July, 1935.
71. Ex. 15-J—Page 12 of Conference Bulletin, August, 1935.
72. Ex. 16—Metalbestos Bulletin & Invoice for printing same.
73. Ex. 17—List of Catalog Filing Co.
74. Ex. 18—Group letter sent to franchise dealers, utility companies, jobbers and special.
75. Ex. 19—Sample of Metalbestos (physical).
76. Ex. 20.—List showing samples sent out.
77. Ex. 21—Invoices from Aluminum Co. of America.
78. Ex. 22—Section of pipe made in accordance with Defts. Ex. 4-E, O'Toole Patent No. 878,014 (physical).

79. Ex. 24—Defendant's Bulletin #302.
80. Ex. 25—Section of Plaintiff's Metalbestos vent pipe without asbestos lining. (physical)
81. Ex. 26—Building Ordinance of City of San Francisco.
82. Ex. 27—Report to J. A. Stadtfeld to C. A. Wright 3/4/33.
83. Ex. 28—3 invoices for aluminum dated 12/30/33.
84. Ex. 29—Letter 9/29/34, Stadtfeld to Payne.
85. Ex. 30—Letter 4/23/35, Trabucco to Defendant.
86. Ex. 31—Invoice showing defendant's purchases from Dutton.

It is further stipulated that the defendant-appellant shall not file two copies of the Reporter's Transcript as provided for in rule 75(b).

A. DONHAM OWEN,

Attorney for Plaintiff-

Appellee.

LYON & LYON,

REGINALD E. CAUGHEY,

Attorneys for Defendant-

Appellant.

It Is So Ordered.

HAROLD LOUDERBACK,

U. S. District Judge.

Dated Oct. 6th, 1939. [114]

[Title of Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 114 pages, numbered from 1 to 114, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Williams Wallace Company, vs. Payne Furnace & Supply Company, Inc., No. 4062-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$14.75, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of October A. D. 1939.

[Seal] WALTER B. MALING,

Clerk.

B. E. O'HARA,

Deputy Clerk. [115]

[Title of District Court and Cause.]

TESTIMONY

Tuesday, March 1, 1938. [119]

Mr. Owen: The defendant, I understand, does not question infringement, is that correct, Mr. Connor?

Mr. Connor: If the claims are valid the device made by the defendant comes within the scope of the patent in suit.

The Court: In other words, it is contended it is not a valid patent because of the prior art?

Mr. Connor: It is covered by the prior art.

Mr. Owen: So that our only issue in that respect is one of validity. We have no issue of infringement at all in this case.

The Court: In other words, it is conceded if you have a patent that they are infringing?

Mr. Owen: Yes. The other issue made by the pleadings is that the defendant claims to have a license under the patent, so that we have in this case two issues.

The Court: A license from your people?

Mr. Owen: Yes, under the patent. The defendant at one time filed a counterclaim for title to the trade-mark under which we sold our product, but that was subsequently dismissed, so that the pleadings relative to that issue are not involved at this time. [120]

In the preparation of this case for trial it seemed advisable in order to avoid [125] the unnecessary

breadth of equivalency in the interpretation of these claims to file a disclaimer. [126]

The Court: Do you want to make your statement now, Mr. Connor?

Mr. Connor: If your Honor please, I would like to wait until the plaintiff has put its prima facie case in.

The Court: Very well.

Mr. Owen: Plaintiff offers as Plaintiff's Exhibit 1 the original copy of the patent in suit. Will you stipulate, Mr. Connor, that a soft paper copy may be substituted for the original?

Mr. Connor: Yes.

Mr. Owen: We will substitute a paper copy later on, your Honor.

The Court: It will be received as Plaintiff's Exhibit No. 1 in evidence.

(The document was marked "Plaintiff's Exhibit 1.") [131]

Mr. Owen: As Plaintiff's Exhibit 2 the plaintiff offers the original assignment of Mr. Stadtfeld to the plaintiff of this patent.

Mr. Connor: No objection.

The Court: It will be received as Plaintiff's exhibit 2 in evidence.

(The document was marked "Plaintiff's Exhibit 2.")

Mr. Owen: It is agreed between counsel that a copy filed with [132] the answer to one of Plaintiff's Interrogatories may stand instead of this original copy which the plaintiff desires to retain.

The Court: It can be removed from that so that it can be handed to the Clerk in the form of an exhibit.

Mr. Owen: It is already marked as Exhibit 2 there.

The Court: It can be easily identified as the one that was removed.

Plaintiff offers as Exhibit 3 a piece of Payne-A-Vent made by the defendant corporation. Payne-A-Vent is the name under which they sell their product.

The Court: It will be received as Exhibit No. 3 of plaintiff in evidence.

Mr. Owen: Plaintiff rests, your Honor. [133]

Mr. Connor: I would like to offer in evidence the depositions of Irwin C. Renisch, E. Albert Guenther, Ben Henry Baker, Etta Shearer, Albert E. Umbarger, E. Elsie Evans and William J. Fox, taken on behalf of the defendant in Los Angeles, California, commencing at 10 a. m. February 16, 1938, before Walter M. Pratt, a Notary Public.

The Court: They will be received as Defendant's Exhibit No. 1 in evidence.

Mr. Owen: I renew my objection with regard to the depositions of Etta Shearer, Albert E. Umbarger, E. Elsie Evans and William J. Fox, that the best evidence was not produced.

Mr. Connor: We will offer the exhibits from A to G inclusive.

The Court: They are part of the depositions, aren't they?

Mr. Connor: They are actually marked as part of the depositions.

The Court: You have the exhibits right there, have you not?

Mr. Connor: Yes, they are attached, they are marked A to G.

The Court: They are part of the depositions. You are offering the whole depositions in evidence, so with the filing of the depositions they carry with them in evidence the exhibits that were [138] offered in connection with them.

Mr. Connor: We have two exhibits attached to interrogatories marked Exhibits A and B. Now, would Court prefer, in so far as those exhibits are concerned, that we start again with Exhibit A before the Court?

The Court: All of those exhibits in connection with the depositions constitute Defendant's Exhibit No. 1 in this Court. What else is there that you want to introduce? Do you want to introduce other exhibits than those?

Mr. Connor: Yes. There is Physical Exhibit G that was introduced on the taking of the deposition.

The Court: Where is it?

Mr. Owen: I must apologize for that. It was not brought up this morning, it will be here this afternoon.

Mr. Connor: That was marked Exhibit G in connection with the taking of the depositions and

would your Honor consider that that likewise goes with the exhibits?

The Court: I presume so. I presume it is in evidence now although it is not in the physical possession of the Clerk, it will have to be turned over to him.

Mr. Connor: These will be Defendant's Exhibit 1?

The Court: The several depositions and their exhibits will be Defendant's Exhibit 1.

(The depositions and exhibits were marked "Defendant's Exhibit 1.")

#### DEFENDANT'S EXHIBIT NO. 1

[Title of District Court and Cause.]

DEPOSITIONS OF VARIOUS WITNESSES,  
TAKEN AT LOS ANGELES, CALIFORNIA,  
COMMENCING AT 10:00 O'CLOCK A. M.,  
FEBRUARY 15, 1938, BEFORE WALTER  
M. PRATT, A NOTARY PUBLIC WITHIN  
AND FOR THE COUNTY OF LOS AN-  
GELES AND STATE OF CALIFORNIA,  
PURSUANT TO NOTICE AND ORDER.

ERWIN G. RENISCH,

having been first duly sworn, deposed and testified  
as follows:

Direct Examination

By Mr. Connor:

Q. State your full name and address, Mr. Renisch.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

A. Erwin G. Renisch. Business address or home address?

Q. Your business address will be sufficient.

A. 1411 Maple, Los Angeles.

Q. And what is your business?

A. Commercial photographer.

Q. I hand you some photographs here and ask you if you can identify those?      A. Yes, sir.

Q. Did you take those photographs?

A. I did, sir.

Q. When?

A. That is something you have got me stumped on. I didn't bring the dates that they were made.

Q. Well, within what period of time?

A. Oh, within the last three weeks. I would say about three weeks ago.

Q. Three weeks ago?

A. Approximately. It may have been two weeks ago.

Q. And do you know where you took those photographs you have in your hand?      A. Yes, sir.

Q. Where?

A. The exact address I have here. It is in the neighborhood of—let's see—6246 Santa Monica Boulevard, which is about three or four doors just east of Vine and Santa Monica.

Q. And who was present when those photographs were taken?

A. Mr. Guenther and the lady that runs this beauty parlor.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Q. That is the Mr. Guenther who is here in the office?  
A. Yes, sir.

Q. And will you just state what those different views are, there?

A. Well, this view here marked 31185-F is a close-up showing where the vent pipe goes through the ceiling, a close-up showing the construction of this vent pipe as it goes through the ceiling. The other view is one taken back, looking through the doorway, showing the whole heater. It shows the vent. It doesn't show the close-up part of it but we have a piece of paper there with the plumber's initials on it that we stuck up there showing the location without being moved. This paper at that time was given back to them and they tore it up so that we couldn't take it elsewhere and make something else similar to it.

Q. Was the lady who operates the beauty parlor present when these photographs were taken?

A. Yes, sir, at all times, standing right there.

(Discussion was had off the record.)

Mr. Connor: I will ask the Notary to mark the first photograph, that is, the distant view, as Defendant's Exhibit A for identification, and the other as Defendant's Exhibit B for identification.

(The photographs in question were marked Defendant's Exhibits A and B for identification, respectively, and are annexed hereto.)

[See Book of Exhibits]

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Mr. Connor: Q. At whose request did you take these photographs just referred to as Exhibits A and B for identification?

A. Well, for the Payne Furnace, under the orders of Mr. Guenther.

Q. I hand you two more photographs and ask you if you can identify those.

A. I sweated blood making these. Yes, these are the ones made at Mrs. Baker's residence.

Q. Do you have the address?

A. Yes, sir, I have. That is 2024 West 43rd Street, or 43rd Place, and they happened to be made the day before these others. We were figuring on making them all in the same day, but when we got there, she had a party in the chair there that was just in line with these shots that we couldn't bother.

Q. They were also made within this period of the last two or three weeks?

A. Yes, sir. It is possible, of course, that I can give you the exact date from the office.

Q. And will you just explain on the record what those two views are?

A. All right. The distance one is showing the location of this water heater and tying in so they could show the close-up. The distance shot again was made in such a way that it was almost impossible to get the part that we were interested in, or just tying in with the water heater. The close-up again shows where the vent goes through the ceiling to the house and showing the construction of it.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Q. And who was present when those photographs were taken?

A. Mr. Guenther, their service man—might I ask him his name, the service man? I met the gentleman but I don't recall.

Q. Whose service man?

A. The Payne service man. The reason he went there with us was to take these things down and do whatever necessary work. This thing here was covering this up (indicating) and he brought it down for us.

Q. That is the close-up view?           A. Yes, sir.

Q. They lowered the plate around the pipe?

A. That's it, and then Mrs. Baker and also their service man, who I think is one of the fellows from the office—he is in charge of the service men, if I am correct.

Q. Like the other photographs, these were made at the request of the Payne Furnace & Supply Company?           A. Yes, sir.

Mr. Connor: I will ask the reporter to mark the distant view as Defendant's Exhibit C for identification, and the close-up view just referred to by the witness as Defendant's Exhibit D for identification.

(The photographs in question were marked Defendant's Exhibit C and D respectively, for identification, and are annexed hereto.)

[See Book of Exhibits.]

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Mr. Connor: Q. What is the significance of the paper with a B on it?

A. That was the same thing. We had her mark her initial and it was thumbtacked up there, just the same proposition. After we were finished with this picture we gave her the paper and she tore it up in our presence so we might not go out and shoot something else and pull the wool over their eyes, as they might say, and I believe, if I am not mistaken, this piece of paper or part of it shows—no, it doesn't—but this hinge here and there (indicating) will tie them together. That was such a very hard place to get, a little closet in the middle of the house, it was almost impossible to get that thing. In fact, I was lying flat on my back on the floor in order to look up under this thing (indicating).

Q. I will show you two more photographs and ask you if you can identify those.

A. Yes. These were made the same day as the C and D and were made at Mrs. Shearer's home at 4022 Third Avenue, in a garage which was partitioned off as a wash room with the water heater in there and stationary tub. Your distant shot there shows that corner of the room which is a very small room that I couldn't show everything but the thing we were interested in. In fact, it was shot from the outside. You will see part of the door. We were looking through the doorway at it, showing part of the heater and the vent going clear to the ceiling.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Your close-up is again showing an exit or vent going through the ceiling and its method of installation. The paper marked E, why, that E I don't recall why we put the E there, but it was again put up there with the idea of identification and tacked in the same place in both of these pictures. The paper shows (indicating) and the paper again was given to Mrs. Shearer and she destroyed it there in our presence. There was Mrs. Shearer, Mr. Guenther and the same service man that appeared in the Baker photograph. That was made on the same day, on the same trip.

Mr. Connor: I will ask the reporter to mark the distant view just referred to by the witness as Defendant's Exhibit E for identification.

Mr. Owen: These offers are just for identification?

Mr. Connor: So far, yes, and the close-up view as Defendant's Exhibit F for identification.

(The photographs in question were marked Defendant's Exhibits E and F for identification by the Notary Public and are annexed hereto.) [See Book of Exhibits.]

Mr. Connor: Q. The photographs last referred to by you were likewise made for the Payne Furnace & Supply Company? A. Yes, sir.

Q. And within this recent period of time of several weeks, you say? A. Yes, sir.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Q. Who marked this sheet of paper with the E on it that is tacked up there (indicating)?

A. Mr. Guenther.

Q. And it was later removed and given to Mrs. Shearer? A. Yes, sir.

Mr. Connor: That is all.

Cross Examination

By Mr. Owen:

Q. Mr. Renisch, you have had a great deal of experience in taking pictures, haven't you?

A. Yes, sir.

Q. And generally when people want you to take pictures, the object is to get as complete a story as possible of what you are taking the picture of?

A. Yes, sir.

Mr. Owen: Mr. Connor, may I ask you, are you willing to admit then that these pictures don't show anything beyond the ceiling line? If you are willing to make that admission, that is certainly all right.

Mr. Connor: Oh, certainly.

Mr. Owen: That is all I want to get from the witness.

Mr. Connor: Certainly, that is all they show.

Mr. Owen: I am not interested in this witness as a mechanical expert but simply as showing that these pictures do not adequately show what the constructions are.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Mr. Connor: That is true. I acknowledge that, Mr. Owen. That is clear.

Mr. Owen: Q. You didn't take any pictures of any of the rest of the pipe where it came out of the roof? A. No, sir.

Q. You said something in a previous answer about being familiar with these kind of things and knowing what the constructions were. Where did you acquire that familiarity?

A. Well, in the last 15 years we have been photographing such things as this, the construction of other furnaces, practically every water heater. I wouldn't say all floor furnaces or anything else, but we have been doing it, making cutaway views and showing the construction of such things.

Q. And where they wanted to show the full construction— A. Full construction.

Q. —with cutaway views, you would photograph the cutaway?

A. No, not necessarily photograph them; from drawings and things we draw them in ourselves.

Q. What do you have to base your drawings on?

A. Their blue prints or something.

Q. In this case you weren't furnished with anything except what you saw?

A. That is all I was to go and show.

Q. And you just took these two pictures in each instance? A. Yes, sir.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

Q. So that in each of these three cases, Exhibits A to F for identification, there is no way that you could tell from looking at them how many sections of pipe there are between what you see here and where the thing comes out the roof?

A. Nothing from what I know now, no.

Q. Nothing from what you knew at any time?

A. Well, by asking. I know what sections pipe comes in and I would imagine how thick the wall is. You could figure it out.

Q. That would be based on speculation?

A. That would be my theory, yes. I know nothing about it because I wasn't interested in that.

Q. Mr. Renisch, if you were given the assignment of going out to any one of these three places and bringing back in photographs adequate to permit an accurate, detailed duplication of the structures in any one of these three cases where you took the pictures, would you have come back with more pictures than you have?

A. Well, if the order just came up and you told me to go out and shoot those pictures, why I would go out and do just what I was told.

Q. Just what you did?           A. Yes.

Mr. Connor: Let's try and confine this within reasonable limits. I think Mr. Owen understands as far as we want to go with this witness, and that is merely to identify these photographs.

Mr. Owen: Yes, and as long as you and I understand each other, that these photographs are not a

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Erwin G. Renisch.)

complete and adequate disclosure of the construction, that's all right with me.

Mr. Connor: If you are talking about the full length of it, I will say "yes."

Mr. Owen: They show just a ceiling line and that is as far as they go.

Mr. Connor: Just the ceiling line. That is all we are establishing at this session.

Mr. Owen: That is all.

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State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, Erwin G. Renisch, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

(Defendant's Exhibit No. 1 Continued.)

Witness my hand and seal this 17th day of February, 1938.

[Seal]                   WALTER M. PRATT,  
Notary Public in and for the County of Los Angeles, State of California.

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E. ALBERT GUENTHER,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Connor:

Q. State your full name, Mr. Guenther.

A. E. Albert Guenther, G-u-e-n-t-h-e-r.

Q. And what is your business.

A. I am with the Payne Furnace & Supply Company, Beverly Hills.

Q. How long have you been with that company?

A. I would say in the neighborhood of four years.

Q. What is the nature of your work?

A. I am now in charge of Public and Employee Relations.

Q. I hand you Defendant's Exhibit A to F for identification and ask you if you can identify those photographs?           A. Yes.

Q. You have heard the testimony of Mr. Renisch, have you not?           A. I have.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Q. Can you state from your knowledge of those photographs what they are?

A. Yes. The first pictures taken were Exhibits F and E. They were taken at 4022 Third Avenue, at the home of Mrs. Etta Shearer. This paper was an ordinary piece of yellow second sheet (indicating) on which Mrs. Shearer described a circle and put an E in for identification purposes.

Q. You were present when Mr. Renisch took the photographs?           A. I was.

Q. And Mrs. Shearer was there?

A. Mrs. Shearer was there and our service man Mr. Larel, L-a-r-e-l Bogue B-o-g-u-e.

Q. And what did you do with that paper after the photographs were taken?

A. It was taken down and handed to Mrs. Shearer, who destroyed it.

Q. Now referring to the other photographs, can you identify those?

A. Yes. This picture is from the home of Mr. Ben Baker (indicating).

Q. Describe it by exhibit number.

A. Oh, I beg your pardon, Exhibits D and C, at the home of Ben Baker at 2024 West 43rd Place, taken on the same date.

Q. And taken by Mr. Renisch in your presence?

A. Taken by Mr. Renisch in my presence and in the presence of Mr. Bogue and Mrs. Baker. This

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

design was marked by Mr. Baker, and Mrs. Baker put "AB" on it and destroyed the paper herself after it was taken down.

Q. And with respect to the other photographs?

A. B and A were taken the day following at Mrs. or Miss—I don't know which—Evans at 6246 Santa Monica Boulevard, in her beauty parlor. This paper was marked by Mr. W. J. Fox, the plumber next door.

Q. The paper appearing with the W.F. on it there?      A. W.J.F.

Q. W.J.F.?      A. That is his mark.

Q. On exhibit what there?

A. On Exhibit B.

Q. It was taken by Mr. Renisch in your presence?

A. By Mr. Renisch, and in the presence of Miss or Mrs. Evans, as the case may be.

Q. And within what period of time were those photographs taken?

A. They were taken the day following these other two.

Q. Approximately how long ago?

A. Within the past three weeks.

Q. Were you the one who procured the services of Mr. Renisch to take those photographs for the Payne Furnace & Supply Company?

A. I was.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Q. Have you personally made any examination of those installations?           A. I have.

Q. To what extent?

A. Upon Exhibit B, I used a flashlight to look up in between the two shells, and some time previous had been on the roof and saw where it came through the roof.

Q. What is your judgment of the construction of the vent pipe shown in Exhibit B?

Mr. Owen: May I interrupt a second? Do you mean by judgment, what did he actually see?

Mr. Connor: Yes.

Mr. Owen: Or what does he speculate he saw?

Mr. Connor: No, what is his decision on what he saw.

Mr. Owen: Yes.

Mr. Connor: Q. What you actually saw, not what you might conclude it to be, but what you saw.

A. I would say that it is one vent pipe, a shell cut below to make a fastening to the ceiling, and the opposite ends turned over to make a spacer for the vent running off the heater.

Q. And that is referring to Exhibit B now?

A. That is Exhibit B.

Q. And what with reference to the other construction?

A. On Exhibit F it shows an outer shell anchored by wire, with a crimped spacer into which

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

the inner shell slides. This is on the first floor and continues up through the second floor to the roof line. However, I could find no space where it was exposed between the first floor ceiling and the roof line.

Q. Now you are referring to what exhibit?

A. F. There are three layers of asbestos paper on the outer shell.

Q. And the next two exhibits?

A. D, using a flashlight and looking up into it, shows an outer shell with a corrugated or crimped spacer and the vent off the heater slid up into that.

Q. Did you make any examination to determine whether, in each instance, the inner tube was slidable with reference to the outer tube?

A. Yes. On Exhibit B I simply raised the down draft diverter to see whether there was a sliding area.

Q. And in the instance there of the corrugated spacer about what longitudinal length was that; how far did that corrugated spacer extend up into the outer pipe, how wide would it be?

A. I don't recall exactly.

Q. Well, from looking at it, what would you judge it to be, whether it extended the full length of the pipe or was it just a short one?

A. No, just a short spacer as I remember it.

Q. I have marked on Exhibit B, D and F the numerals 1, 2 and 3. In order to clarify the record,

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

will you please state just what each one of those different parts is with reference to your testimony?

A. Number 1 is a galvanized shell.

Mr. Owen: Which exhibit for identification are you referring to?

Mr. Connor: All three.

Mr. Owen: B, D and F.

The Witness: Covered with asbestos paper. Number 2 in Exhibit D and F are crimped spacers made of galvanized metal, and number 2 on Exhibit B is a cut-in spacer. Number 3 on all three exhibits are galvanized vent pipes.

Mr. Connor: Q. Well now, you have referred to inner and outer tubes. Which do you refer to as inner and which is outer?

A. Number 1 in all cases is the outer tube, and number 3 is the inner tube.

Q. Did you make the preliminary investigation, Mr. Guenther, with respect to these various locations where these vent pipes were found?

A. I did.

Q. Did you make any request of these people as to whether these vent pipes might be removed?

A. I did.

Q. For our purposes? A. I did.

Q. And what was the answer you received in each case? A. "No."

Q. They wouldn't permit you to remove them and substitute other vent tubes?



(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

A. No, they would not.

Mr. Connor: I think that is all.

Cross Examination

By Mr. Owen:

Q. Mr. Guenther, would you say that any of these constructions in the Exhibits A to F for identification were factory made jobs or were they of the type that were assembled on the job by the installer?

Mr. Connor: I object to that as calling for a conclusion of the witness. We have not examined this witness upon who made the vent pipes or when they were made. It is not proper cross examination and is merely calling for a conclusion of the witness. I think further that your question is a little indefinite as to what you determine is a factory made job or what otherwise is made on the job. Even if the question were proper, I think it is confusing in that respect. I am not conceding that it is proper.

Mr. Owen: Would you read the question to the witness?

(The question was read by the reporter.)

The Witness: Am I to answer that?

Mr. Owen: Yes.

(A discussion was had off the record.)

The Witness: I understand from those men——

Mr. Owen: Q. What men?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

The Witness: Pardon me just a minute until I complete it—those men who years ago installed this type of vent, that it was manufactured in the shop and taken onto the job and there connected.

Mr. Owen: Q. Now then, with your flashlight as you looked up through these crimped spacers, were you able to tell how many sections of vent pipe there were from the heater to the ceiling?

A. I did not try to.

Q. You weren't able to tell that?

Mr. Connor: Pardon me just a moment. Will you read that?

(The question was read by the reporter.)

(A discussion was had off the record.)

Mr. Owen: Q. In my question I meant from the heater to the roof and not from the heater to the ceiling. I misspoke myself.

A. I did not try to.

Q. You weren't able to determine that?

A. I did not try to.

Q. From the flashlight examination?

A. No.

Q. Now I will ask you the same question with regard to the outer shell in these different instances which you have labeled with the numeral 1: were you able to tell with your flashlight examination how many sections there were there between the ceiling and the outlet to the roof?

A. I did not.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Q. Nor I suppose were you able——

Mr. Connor: Pardon me just a moment, Mr. Owen. To clarify the record, by sections you mean longitudinal sections?

Mr. Owen: That is correct. In other words, if it was one pipe running clear from the ceiling to the roof or a plurality of sections joined together with male and female couplings.

Mr. Connor: Yes.

Mr. Owen: Q. Well, then, I suppose, Mr. Guenther, that not having been able to determine if there were any sections or not, you wouldn't, naturally, know if there were a plurality of sections, whether they were put together with male and female joints or butt joints or which way the male and female joints would have come? A. No.

Q. Now from your flash light examination were you able in any of these instances to find layers of insulation in between the vent pipe proper and the outer shell which you numbered one?

A. I did not look for it.

Q. But you didn't see it in any of these cases, did you? A. Not to my knowledge.

Q. In all of these cases, whatever insulation there is, is wrapped around the outer pipe, is that not correct? A. Yes.

Q. From your flashlight examination of any of these constructions were you able to determine the

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

condition of the pipe, that is, whether it was still whole or filled with holes from rust or other forms of corrosion?       A. I did not.

Q. You weren't able to determine that. It couldn't be determined, could it, from just the flashlight examination from a narrow, little slot?

A. I think in the one picture there, if it were shown to be defective, that is, if it were close enough to the entry it might have shown, but I didn't investigate for that.

Q. Which picture are you referring to?

A. That one in your right hand.

Q. The one marked Exhibit B for identification?

A. Yes, sir.

Q. In that case, Exhibit B for identification, how far up the pipe would you have been able to determine it from a flashlight examination?

A. I wouldn't say over six or eight inches.

Q. It was further than that to the roof, wasn't it?       A. Yes.

Q. I suppose considerably farther. You went up on the roof?       A. Yes.

Q. How far would you say?

A. I imagine that would be three or four feet to the roof proper. Then there is a section extending above the roof, of course.

Q. And your flashlight examination didn't enable you to determine anything, or wouldn't have

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

enabled you to determine anything above six or eight inches above the ceiling?      A. No.

Q. Now in your flash light examination, if you weren't able to determine how many, if any, plurality of sections there are between the ceiling and the roof you wouldn't have been able to determine whether those joints between the plurality of sections came substantially in a radial zone or semi-radial zone, would you?

A. You mean directly opposite?

Q. Yes, radially?      A. No.

Q. From your experience in the heating business which, I believe, has been considerable, hasn't it?

A. Well, in venting, not heating, particularly.

Q. Would you say that in either of these three cases, the composite parts were shipped from the shop to the job in assembled relation as they are now?      A. I have been told——

Mr. Connor: No, that is objected to as a conclusion. Just testify to facts of your own knowledge.

The Witness: I have never seen any sent out of that particular type as used in those three photographs.

Mr. Owen: Q. In assembled relation?

A. In any relation.

Q. They are all assembled at the job; isn't that correct?      A. I don't know.

Q. You have never seen these at all?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

A. These are previous to any type of that method of venting excepting the present type, of course.

Q. You have mentioned that you have had considerable experience in the venting business.

A. Yes.

Q. How long and what type of experience have you had?

A. Selling Vitex for the Plant Rubber and Asbestos Company.

Q. When did that begin?

A. Well, to give an idea, say, eight years ago.

Q. Eight years ago. That would be about 1930?

A. I would say about there.

Q. And how long were you with them?

Q. Well, I was with them previous to that time.

Q. Doing different work? A. Yes.

Q. What kind of work were you doing?

A. Selling their asbestos products.

Q. Then when did you leave the Plant Rubber and Asbestos Company?

A. Oh, I would say approximately four years ago.

Q. That is when you came with Payne?

A. Yes.

Q. The defendant in this case? A. Yes.

Q. Well, then, your experience with flue pipes dates about eight years back?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

A. Yes, at least that; maybe more. I don't remember the dates.

Q. Mr. Guenther, from these pictures, Exhibits A to F for identification, in any one of these three instances, would you, as an experienced flue man, or at least with eight years experience in the flue business, be able to take these pictures and go into the Payne shop and direct a man to construct a perfect copy of any one of these constructions?

A. When you say perfect, that embodies a whole lot.

Q. That means exactly accurate from the top of the heater to where it comes out at the roof, all that is hidden in between the ceiling and the roof which is not shown by any of the photographs.

A. Only through past experience.

Q. But it wouldn't be based on the actual reproduction of these physical structures, would it?

A. It could not be done unless the entire construction were torn down.

Q. That is the only possible way of finding out accurately what these constructions are, isn't it?

Mr. Connor: I understand that question is limited to this witness, that is, as to whether or not this witness could actually do it. It might be done by someone else and that would be a mere conclusion, So I assume that the question calls for his own knowledge.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Mr. Owen: I am asking what he, as an experienced flue man, given these pictures, would be able to do toward reproducing an identical structure in the Payne shop or any other shop of these constructions from the heater to the roof.

The Witness: When you say identical, you take in too much territory.

Mr. Owen: Q. In other words, these pictures don't give enough to paint the full story, do they?

A. They do for me to go out and reproduce one similar to it, yes.

Q. But not to reproduce what is here in these actual instances?

Mr. Connor: Well, pardon me for interrupting. I don't think the question is clear. Do you mean identical material or identical structure?

Mr. Owen: Identical *structurely* from the ceiling, which is the last thing you can see here, to the roof.

Q. You don't know anything of what lies in between that zone, do you? A. No.

Q. You only can speculate as to what is in between that zone? A. From past experience.

Q. The ceiling and the roof?

A. From what I have seen.

Q. But you don't know what is in there in any of these three instances?

A. Yes, I know about what is in there.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Q. You mean you think you know what is in there?      A. From past experience, exactly.

Q. You think you know what is in there, what you might expect to find?      A. Yes.

Q. But you don't know actually what you would find?      A. No.

Q. Until you take it out?      A. No.

Q. Was Mr. Baker present when the pictures, Exhibit C and D, for identification were taken?

A. He was not. His wife was but he marked the paper and his wife put her initials on it. The paper was immediately taken down and she destroyed it.

Q. Now, I believe, Mr. Guenther, in connection with Exhibits A and B for identification, you said it would be some three or four feet between the ceiling and the roof?      A. I would say so.

Q. Now, in Exhibits C and D for identification, do you recall how many feet there would be here between the ceiling and the roof?

A. I would say it was approximately the same. This, as I remember, is a flat building, a flat roof, one story residence.

Q. One story residence?      A. Yes.

Q. Well, then, do you have any recollection or did you make an examination to be able to determine what the galvanized pipe to the right of the water heater in Exhibit C for identification was used for?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

A. Yes. It is a vent pipe that was put in for a little floor furnace stuck over in the side of the hall. I don't know who put it in or when. That is an additional flue running up alongside of the heater.

Q. That runs out the roof, too?

A. Yes. It comes up here and cuts across and then up through (indicating). I didn't examine to see what that run in.

Q. You don't know what kind of vent pipe that is, whether it is just a single shell or a double shell or what?      A. I haven't any idea.

Q. You can't tell, can you, just from looking at the outside of the pipe?

A. No. From the size of it I would say it is just a single pipe, and whether that is a permissible pipe I don't know. I had nothing to do with that.

Q. It looks like a fairly recent installation, doesn't it?      A. I imagine it is.

Q. Well, now, in the case of Exhibit E to Exhibit F for identification, do you recall about what distance it would be to the roof outlet from the collar which you have marked 2 here where the vent pipe 3 becomes invisible as it passes up through the outer (indicating)?

A. I would say that would be from 10 to 12 feet.

Q. From 10 to 12 feet. Now, then, if you will examine this Exhibit F for identification, it doesn't look as if there is a metal shell inside of that asbes-

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

tos wrapping, but simply the asbestos itself wrapped around there, is that correct?

A. However, there is a metal shell inside there, showing right there (indicating).

Q. The witness indicates the region near the wire. Did you examine it to determine that?

A. I did.

Q. In this case the asbestos is wrapped on the outside of the outer shell, isn't it?

A. Yes. The entire pipe is held in place by this wire fastened in (indicating).

Q. That is, it is supported vertically by that?

A. Vertically.

Q. You don't know how many sections, if it is a plurality of sections?      A. No.

Q. How many there would be between there and the roof?      A. No.

Mr. Connor: Answer audibly.

The Witness: I said no.

Mr. Owen: Is Mr. Guenther going to be along with us when we are actually at these places?

Mr. Connor: Yes.

Mr. Owen: So that he could be asked further questions on cross examination?

Mr. Connor: Yes.

Mr. Owen: Is that agreeable to you?

Mr. Connor: Yes.

Mr. Owen: I think that is all I will ask him now.

(Defendant's Exhibit No. 1 Continued.)  
(Deposition of E. Albert Guenther.)

Redirect Examination

By Mr. Connor:

Q. I believe you previously testified on direct examination that in these installations here, the inner pipe slid into the other pipe, with the spacer between. Now, from your past experience in vent piping, if you were given any one of these photographs from which to construct a vent pipe, what would you do, taking what information is visible here? What would you do other than making a continuous pipe as shown at this lower end?

A. Simply make one pipe for the outer shell with a spacer, another pipe half an inch smaller to slide up into it and turn the edge on the top.

Q. That is, one pipe slid into another with the spacer between. Now, from your knowledge of venting, would there be any reason that you can conceive of for changing that type of construction between the ceiling and the roof; is it necessary to put anything else into it?

A. I couldn't think of anything.

Q. In other words, there is no reason for doing other than making the telescoping pipes with spacers between, whatever length is desired?

A. Exactly.

Mr. Owen: It is understood, Mr. Guenther, isn't it, that your answers were purely hypothetical? They weren't based on actual experience?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

Mr. Connor: I was just redirecting—pardon me. I will let him answer that.

The Witness: What was the question?

(The statement of Mr. Owen was read by the reporter.)

The Witness: Well, now just how do you mean that?

Mr. Owen: Q. Well, I asked you in the light of your experience and knowledge of venting, and you answered accordingly, is that correct or not?

The Witness: It is.

Mr. Owen: The point is this: it would only be proper to redirect if your questions went to what these constructions actually showed, because that is all that I was asking.

Mr. Connor: No, Mr. Owen. It is redirect in the light of your questions to Mr. Guenther to establish that from the information that is shown, given by these photographs, he could not construct a vent pipe extending from the ceiling to the roof.

Mr. Owen: That would be a Chinese copy of whatever these actual constructions may be.

Mr. Connor: Yes. Well, then, I will include in my question "Chinese copy" except as to material, because it doesn't show material.

Mr. Owen: Now, if he will answer that question I won't object to it, if he understands that your hypothetical question is as to his ability to

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Albert Guenther.)

make a Chinese copy from these pictures. He has already given me an answer that he couldn't.

Mr. Connor: That is not my question. My question is this. I will ask it again. From your knowledge of, we will say, vent pipes acquired over the past eight years, could you obtain sufficient information from these photographs to construct a like vent pipe of any length?           A. Yes.

Q. Whether it is three foot sections or foot sections or what not?           A. Yes.

Q. My further question was, from your knowledge of vent pipes, is there any reason that you know of which would require the two different ends of a continuous length of vent pipe to be constructed any differently than is shown in these photographs?

A. No.

Mr. Connor: That is all.

Mr. Owen: I object to those two questions and ask that they be stricken on the basis that it is not proper redirect because the witness is asked to speculate as to what he would do today in the light of his present knowledge.

Mr. Connor: He has been asked to do a lot of speculating. That is all.

(Whereupon, the taking of the depositions was continued and adjourned to the hour of 12:30 o'clock p.m., of the same day at 2024 West 43rd Place, Los Angeles, California.)

(Defendant's Exhibit No. 1 Continued.)

State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, E. Albert Guenther, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 17th day of February, 1938.

[Seal]

WALTER M. PRATT

Notary Public in and for the County of Los Angeles, State of California.

(Defendant's Exhibit No. 1 Continued.)

(At the hour of 12:30 o'clock p.m., of the same day, the taking of the depositions was resumed at 2024 West 43rd Place, Los Angeles, California, all parties being present.)

BEN HENRY BAKER,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Connor:

Q. Will you state your full name and address, Mr. Baker?      A. Ben Henry Baker.

Q. And your address?

A. 2024 West 43rd Place.

Q. What is your business?

A. Manager for the J. Hokom Plumbing Company.

Q. Where is that place of business located?

A. 4709 West Pico.

Q. And how long have you been in that position?

A. I have been with the company now for over 20 years.

Q. And what are your duties? That is, what is your line of work? What class of work do you do in connection with your managing that place of business?

A. Well, it is just superintendent of work, you might say, and I sometimes go out on small jobs.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. And in connection with your work and included within that business is the installation of gas heaters?

A. Hot water heaters, yes, sir.

Q. Gas hot water heaters?

A. Gas hot water heaters, yes.

Q. And in connection with the installation of gas water heaters, do you have anything to do with vent pipe, that is, pipe venting the hot water heaters?      A. Yes, sir.

Q. How long have you been connected with the installation of vent pipes and hot water heaters?

A. Well, in the last 25 years.

Q. I hand you two photographs, Mr. Baker, and ask you if you can identify those.

A. I do, yes.

Q. Will you state what they are?

A. Well, they are a heater and a vent located at my own home.

Q. That is, this present address where we are now?

A. This present address, yes.

Q. And one is a close-up view and the other is a distant view, is it not?      A. Yes.

Q. That is, referring to Defendant's Exhibits C and D. I would like to have it noted on the record at this time that the installation as shown on the photographs, Exhibits C and D, has been examined

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

not only by Mr. Baker but by Mr. Owen, counsel for plaintiff, and Mr. Williams, a member of the plaintiff firm.

Mr. Owen: Just a minute. You mean we have viewed as much of the installation only as is shown in those photographs, Defendant's Exhibits C and D for identification.

Mr. Connor: That is what I said, shown in the photographs.

Mr. Owen: The complete installation has not been removed from the ceiling for us to examine.

Mr. Connor: Yes, that is what I meant to say, Mr. Owen.

Mr. Owen: Just before we go on, I want to clear this up. You are not going to introduce in evidence the actual physical structures?

Mr. Connor: No.

Mr. Owen: Well, then, I would like to note an objection on the record to any testimony with regard to these three alleged prior uses on the basis that we do not have produced the best evidence because the things themselves are available and they at least should be examined to see what the constructions show. For that reason I want to note this objection and also to state that I shall move to have this deposition suppressed unless we have the best evidence.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Mr. Connor: In connection with your objection, Mr. Owen, I will ask Mr. Baker, has any request been made of you for permission to remove the vent pipe shown in those photographs?

A. No.

Q. Has anyone asked you to take them out?

A. No, sir.

Q. Would you permit their being taken out, that is, entirely taken out and new vent pipes put in or would you want your house torn up to that extent?

A. Well, I don't think I would care to have it torn up like that.

Q. I understand it has been your attitude, Mr. Baker, that you didn't want your house torn up?

Mr. Owen: I object to your leading the witness.

The Witness: No, I have never made any statement one way or the other.

Mr. Connor: Q. What statement do you make now if we would request permission to tear those vent pipes down?

A. Well, I would object to it.

Q. That is sufficient. I thought the objection had been made previously. Mr. Baker, who installed the water heater and the vent pipes shown in the photographs Exhibits C and D? A. I did.

Q. About when was the installation made?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. That installation was made in December, 1923.

Q. You own this property here, do you not?

A. Yes, sir.

Q. And have you lived in it continuously since it was built?           A. I have, yes.

Q. Was that about the time the house was built?

A. Yes, sir.

Q. You personally supervised the installation, did you?

A. I did, and installed it myself.

Q. You installed the vent pipe yourself?

A. Yes. I put the plumbing in here myself.

Mr. Owen: I just want the record to be clear that my objection goes to all this testimony.

Mr. Connor: That is understood.

Mr. Owen: Because of the failure to produce the best evidence.

Mr. Connor: That is understood.

Q. Where was the vent pipe made that is shown in the photographs Exhibits B and D?

A. After that I couldn't tell you. It was taken out of the stock of the J. Hokom Company.

Q. At the place of business where you are now manager?

A. No, sir. That place of business was at 4312 South Broadway then.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. How long is the vent pipe, that is, from the point at the ceiling to its exit at the roof?

A. I would say it is approximately three feet.

Q. And it is just one section of vent pipe, is it?

A. Yes.

Q. Will you describe the construction of that vent pipe?

A. Well, the outer shell is a size of about four inches, covered with asbestos paper.

Q. That is designated by what numeral on the photograph? You see some numerals there.

A. I would say that would be numeral 1.

Q. Yes.

A. And the inside is a three inch pipe slipped through the four inch with little spaces put in between them to hold the three inch from the four inch, to create an air flow in between the pipes.

Q. And of what type are the spaces?

A. Well, just kind of a corrugated galvanized tin.

Q. Of about what length?

A. Well, I would——

Q. I mean vertical length.

A. Oh, vertical length? I would say about one or one and a quarter inches.

Q. And how many of those spacers are in the full length of the vent pipe?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. Well, if I remember right there is one at the bottom and one at the top.

Q. Is there any other material in the space between the two tubes?      A. No, sir.

Q. Just an air space?

A. Just an air space.

Q. Is the inner tube slidable with reference to the outer tube?      A. Yes, sir.

Q. How were those tubes made up when you got them from the Hokom Company?

A. Well, they were made up, the three inch fits right on the inside of the four inch. We bought them in sections. I don't remember how long they were, but we used to cut them off at whatever length we wanted.

Q. And when you purchased them the inner tube was fitted into the outer tube with the spacers between?      A. Yes, sir.

Q. And you just installed them that way?

A. Yes.

Q. In making your hook-up with the heater, how did you do that? Did you first install the outer shall in the wall, put that in first and then the inner tube in that or did you put it all in together?

A. No, all in together. I took a length and cut it and fastened it right in place.

Q. Then how did you hook it up with the heater?

A. Well, the heater—the pipe from the heater

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

was crimped on the end where we connected to this here—what we would say concealed vent, just slipped it up into that and made a slip-connection.

Q. That is, the inner pipe of the vent was slipped onto the vent pipe of the heater?

A. Well, I wouldn't say that, no. The heater vent was slipped into that.

Q. Into the inner pipe?                   A. Yes, sir.

Q. But there was no fastening means to fix movement of the inner pipe relative to the outer pipe?

A. No.

Q. Can you identify that white sheet there, Mr. Baker?

A. With the initial B on it?

Q. With the initial B on it.                   A. Yes.

Q. Did you make that?                   A. I did.

Q. And who did you give it to?

A. Mr. Owen.

Q. You mean Mr. Guenther?

A. Mr. Guenther.

Q. Is there any question at all in your mind but what Exhibit C and C are photographs of the heater installation in this house that we have all examined?

A. No question at all.

Q. What has been your experience with vent pipes, that is, installation of vent pipes similar to those shown on the photographs Exhibits C and D over a period prior to the year 1930?

Mr. Owen: Object to the question unless he is testifying about this structure.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Mr. Connor: His experience with vent pipes similar to that. That is the question.

The Witness: Well, I don't exactly get that question clear. I might answer it in a way that I think you put it: my experience on those kind of vents there has always been practical, you might say, and in using those kind there has never been any fire hazard condition that prevailed that I know of.

Mr. Connor: Q. Well, what I mean is, have you made or witnessed installations of very many vent pipes of that type say prior to 1930?

A. Practically all of that same type since I can recall.

Q. The same vent pipe?

A. The same vent pipe.

Q. And your experience, from your knowledge of such installations, was that a very common practice during that period of time?

A. Oh, yes, that was common practice to use that kind of pipe.

Q. Did you ever have occasion to use a pipe like that with asbestos between the tubes?

A. No.

Q. Just on the outside?

A. Just on the outside.

Q. Do you know of your own knowledge whether that structure was required by any city ordinance or any building regulation?



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. Wrapped on the inside?

Q. No, on the outside.           A. That was

Q. Like those shown in the photographs.

A. Yes. That was the city ordinance at that time. When that was installed it met with the requirement. That heater vent was passed by the city plumbing department of Los Angeles.

Q. Have you ever installed vent pipe like that where it required more than one section to extend from the heater to the roof?           A. Yes.

Q. In many instances?

A. Well, yes. I think we have had about all classes of heater vents to install, different lengths.

Q. How did the lengths generally run?

A. If I remember right they ran in a length of about six foot.

Q. And where you used more than one joint, how would you put them together?

A. Well, they would go together something like a stove pipe. They would crimp them together and slip them in there.

Q. Those were installations where your inner pipe was slidable with reference to your outer pipe, too?           A. Yes.

Q. Have you lived in this house continuously since it was built and since that installation was made?           A. Yes, sir.

Q. Has there ever been any change in it since it was first installed?           A. No, sir.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. Did I understand you to say that that outer tube is covered with a wrapping of asbestos?

A. Yes, sir.

Q. Of what material is the vent pipe made?

A. It is made of galvanized iron, galvanized sheet iron.

Q. The material that is commonly used for that construction?

A. Yes, sir.

Mr. Connor: I think that is all.

Mr. Owen: I want it understood that my cross-examination of this witness and any of the other witnesses is without prejudice to the objection to this witness' testimony and any other testimony where the actual device is not produced in evidence, on the basis of its not being the best evidence.

### Cross Examination

By Mr. Owen:

Q. Now, Mr. Baker, you say that your job is that of superintendent, and that you go out on small jobs. I assume that you also have to figure estimates on jobs, putting in vents and installing equipment; is that correct?

A. That is correct.

Q. Now, if someone else owned this house and called you here and said, "I want a new vent pipe put in there," how much would you estimate that it would cost to put in a new vent pipe?

A. Well, that probably would run in the neighborhood of about seven fifty.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. Dollars?           A. Yes.

Q. And if they said, "Would that be in as good shape as it is now when you get all done," what would your answer be?           A. It would, yes.

Q. When you come right down to it, you would have no objection now if someone took that vent pipe out and put in a new one that would pass the present city ordinance, would you?           A. No.

Q. Since that vent pipe was installed, the city ordinances have been changed, haven't they?

A. Yes, sir.

Q. So you couldn't take this one out and put back another one just like it?           A. No.

Q. This one is not satisfactory with the standards of the city?

A. It does not meet the city requirements now as I understand it.

Q. That is correct. Have you ever had that out since you installed it to see what condition it is in?           A. No, sir.

Q. You don't know then whether any of the condensate has eaten out the pipe or just what the true condition is, do you?           A. I don't know.

Q. Now, you said that the heater vent pipe slipped into the inner pipe. I suppose the crimped end was on the heater vent pipe, wasn't it, that is, the male end?

A. Yes, the male end is on the heater vent pipe.

Q. Yes. So that if there had been any conden-

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

sate running down, it would have run down and then out through those crimps on the outside of the vent pipe?           A. That is right.

Q. Did you ever make any tests on this vent here or any other vent of a similar type to determine how long it takes to get your stack temperatures?           A. No.

Q. In operating conditions?

A. No, I haven't.

Q. So that you have no idea as to its efficiency?

A. No.

Q. I believe your testimony was that you had never seen a vent pipe where the asbestos was of air cell type in between the inner and the outer tubes?           A. No, not to my knowledge.

Q. And you don't recall, do you, an installation where there was more than one section of this vent pipe of the type in your house here installed?

A. No.

Q. That is just your best recollection?

A. Just my recollection.

Q. There might have been some?           A. Yes.

Mr. Owen: That is all.

#### Redirect Examination

By Mr. Connor:

Q. Have you ever encountered any difficulties with the use of this vent pipe, that is, whether it does not properly carry off gases and so on, Mr. Baker?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. I never have. It has always worked satisfactorily.

Q. Isn't it a fact that the city will permit you to hook a heater up to a vent pipe of that type if it is still in good condition?

A. It will, yes. We can hook into them.

Mr. Connor: Well, in the light of your objection, Mr. Owen, I am going to request Mr. Baker to let us remove that vent pipe and replace it with a proper vent pipe in order that we may have the very best evidence. We are perfectly willing to produce it if it is possible.

Q. Will you permit us to do that, Mr. Baker?

A. What do you mean, take that out?

Q. And put a new one in for you.

A. Yes. You can take it and put another one in there if you want to take that one out.

Q. All right, then, we will do that. How soon can we do it?

A. Most any time now. Suit yourself.

(A discussion was had off the record.)

Mr. Connor: In the light of Mr. Baker's giving us permission to remove the vent pipe in question here for the purpose of evidence in this case, I suggest that the hearing on Mr. Baker's deposition be continued until tomorrow morning at 10:00 o'clock.

(Whereupon the taking of the deposition of Ben Henry Baker was continued and adjourned

(Defendant's Exhibit No. 1 Continued.)  
until the hour of 10:00 o'clock a. m., February  
16, 1938, at the same place.)

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(The taking of further depositions was there-  
upon continued and adjourned to the hour of  
3:30 o'clock p. m., February 15, 1938, to 4020  
Third Avenue, for the purpose of taking the  
deposition of Mrs. Etta Shearer.)

(At the hour of 3:30 o'clock p. m., February  
15, 1938, at 4020 Third Avenue, Los Angeles,  
California, the taking of the deposition was  
resumed, all parties being present.)

ETTA SHEARER,

having been first duly sworn, deposed and testified  
as follows:

Direct Examination

By Mr. Connor:

Q. Will you state your full name, please, Mrs.  
Shearer? A. Etta Shearer.

Q. And your residence address?

A. 4020 Third Avenue.

Q. How long have you lived at this address?

A. How long have I lived at this address? Well,  
on this lot here I have lived here since 1919.

Q. In this particular house?

A. This house and the other one on the lot.

Q. That is, you are speaking now of the house  
in the rear? A. Yes.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

Q. On the rear end of the lot? A. Yes.

Q. That is No. what? A. 4022.

Q. And do you own this property?

A. Yes, sir.

Q. Did you have it built yourself?

A. I built it myself.

Q. You built it?

A. I bossed it, I bought my lumber.

Q. For both houses?

A. Yes, I bought my lumber and everything.

Q. And what year was the house at 4022 built?

A. It was built in the fall of 1924.

Q. And you have lived on the premises here continuously since that time?

A. Yes, sir. I lived in that house up until last fall after it was built.

Q. I will show you two photographs, Mrs. Shearer, marked Defendant's Exhibit E and Defendant's Exhibit F, and ask you if you can identify those? A. Sure.

Q. Can you state what they are?

A. Well, it is the heater in the rear house downstairs.

Q. At 4022? A. Yes.

Q. And were you present when the photographer took those pictures? A. I was.

Q. And did you—

A. We put that paper up and put an E on it but I don't see the E on it—yes, I can now. Yes, I see it now.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

Q. And did you mark the E on the paper?

A. Yes, sir.

Q. You are certain that those are photographs of the heater and the vent pipe in the rear house, 4022?

A. Yes, sir. I would know that wherever I was if shown to me.

Q. Do you know when that vent pipe was installed?

A. Well, it was installed that fall. I moved in the house the 3rd of November and I started building it in October, along the fore part of October—September, it was—and it was finished up so that I moved in the 3rd of November. I commenced along about Labor Day building it.

Q. Has there even been any change made in that vent pipe since it was first installed?

A. No, the heater and the vent pipe is just as it was put in.

Q. Do you know who installed the vent pipe and heater?      A. Yes, sir.

Q. Who is that?

A. Well, Mr. Augustine of the hardware store of course had the contract of it but his partner, Umbarger, Earl Umbarger installed it.

Q. And you were on the premises at the time, during the time the installation was being made?

A. I'll say I was, every day. I was on the premises and bossing it about and watching it built. You can't build a house without you are there because



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

they'll slip something over on you if you aren't there.

Q. Have you ever had any difficulty in the functioning of this vent pipe since it was installed that you know of?

A. No, there has never been no trouble with it.

Q. Did Mr. Guenther ask you for your permission to remove that vent pipe for the purpose of this case?

A. Yes, he did and I wouldn't let him.

Q. You still refuse to let him?

A. I still refuse to let him because it is in there O.K. and it is going to stay there O.K.

Mr. Connor: I will now offer in evidence on behalf of the defendant, Defendant's Exhibits E and F for identification as Defendant's Exhibits E and F.

Mr. Owen: I object to the introduction of these exhibits on the ground that they are not a complete picture of the installation at 4022 Third Avenue and they are not the best evidence of that installation.

(Defendant's Exhibit E and F for identification were thereupon offered in evidence as Defendant's Exhibit E and F.) [See Book of Exhibits.]

The Witness: I don't know how they could get a better picture of that than what they have got.

Mr. Owen: Now, Mrs. Shearer, there are a few questions I want to ask you.

The Witness: All right.

(Defendant's Exhibit No. 1 Continued.)  
(Deposition of Etta Shearer.)

Cross Examination

By Mr. Owen:

Q. Looking at these pictures which are here, you don't know, do you, how many sections of pipe there are between the heater and the roof?

A. I didn't pay any attention to that.

Q. You have no idea?

A. No, they run the pipe up through there and I knew when Earl done it it was done right because when the inspector came out here he wanted to know who done the job and I told him Earl Umbarger did. He said, "There is really no need of me inspecting it because when I go on a job that he had done, there is no inspection to be done." He said, "I find everything O.K.," so naturally when the city inspector said that I didn't pay any attention as to how many joints of pipe there was because I didn't know that I ever had to tell it.

Q. Do you know that if an installation were to be made today of a vent pipe like that particular pipe there, it wouldn't pass an inspection?

A. Why certainly it would pass inspection.

Q. Do you know that the rules are such that it would not, today?

A. Well, it might not today but they passed it then because the inspector passed it.

Q. Yes, but my question was——

A. Well——

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

Q. —do you know that it wouldn't pass inspection today?

A. No, I don't know that it wouldn't. I know there has never been any fire or anything like that from it and so, of course, it passed inspection when I built it but they change the rules and the laws so much you can't keep up with them. That has been a good many years ago since that has been put in.

Q. Well, if you were offered a new vent pipe that would pass inspection today installed there in place of the other one, would you have any serious objection to its being changed?

A. Well, what would be the use of it being changed? It would tear the plaster out, probably.

Q. That would all be replaced.

A. No. I wouldn't have the plaster torn out. My house is built, it is all right and it is going to stay just as it is. My tenants are in there and I wouldn't have the plaster torn out and molest them and a whole lot of dirt for nothing. There would be nothing in it to me.

Q. Of course you don't know what the construction of that pipe is inside, do you?

A. Why, I know that it passed inspection. I know that.

Q. You don't know what the construction of the pipe is; just answer my question.

A. It is just the same as it is down below, that is all I know.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

Q. If you will just answer my question yes or no. You don't know what the construction of that pipe is?

A. Well, I don't know only it is just the pipe that is there and then they have got other pipe put in up there, I suppose. When he put that vent pipe up I didn't pay no attention as to that because I know he had those tile things, so I suppose the tile is in there around that.

Q. Tile?

A. Yes. I didn't pay no attention to that because Earl is so thorough with his work that I didn't pay any attention to him. It was the carpenters I was paying attention to.

Mr. Owen: I want to renew my objection to testimony about this prior use on the basis that it is not the best evidence obtainable as to the construction of that pipe.

Mr. Connor: You mean because it is secondary? You term it secondary evidence?

The Witness: I suppose if I was in there myself you could go up in the garret, you could see what was up there.

Mr. Owen: Q. There is a garret that you can get into?

A. Oh, yes, there is a garret that you can get in but I am not going to molest the tenants for that because you can see the bottom of it and that bottom

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Etta Shearer.)

is what you want. You don't want the top of it. That top of it doesn't make any difference. What you are wanting is that part there at the bottom.

Mr. Owen: I have no more questions.

Mr. Connor: I think that is all.

(Whereupon the taking of the depositions was continued and adjourned to the hour of 3:45 o'clock p. m. of the same day at 2107 West Santa Barbara Avenue, Los Angeles, California.)

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State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, Etta Shearer, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

(Defendant's Exhibit No. 1 Continued.)

I further certify that I am not interested in the event of the action:

Witness my hand and seal this — day of —, 193—.

.....  
Notary Public in and for the County of Los Angeles, State of California.

—————  
(At the hour of 3:45 o'clock p. m., February 15, 1938, the taking of the depositions was resumed at 2107 West Santa Barbara Avenue, Los Angeles, California, all parties being present.)

ALBERT E. UMBARGER,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Connor:

Q. What is your full name Mr. Umbarger?

A. Albert E.

Q. And your address?

A. 1856 Middleton Place.

Q. And what is your business?

A. Plumber.

Q. How long have you been engaged in that line of work?      A. 26 years.

Q. Who is your employer at this time?

A. Myself.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

Q. Are you a member of the firm here at this address?

Mr. Augustine: The Augustine Hardware Company is the employer.

The Witness: The company would be the employer, yes.

Mr. Connor: Q. And in connection with your work, do you install water heaters? A. I do.

Q. And the usual vent pipes with them?

A. Right.

Q. Have you been doing that work for the period of time that you say you have been in the plumbing business?

A. Well, of course, water heaters, probably I have been installing them for about 15 or 20 years.

Q. And how long have you been in the employ of the Augustine Hardware Company?

A. 15 years.

Q. Do you recall making an installation of a water heater at 4022 Third Avenue?

A. Well—

Q. For Mrs. Shearer?

A. I guess that is the addresses

Mr. Augustine: It wasn't that address at that time.

The Witness: No.

Mr. Augustine: It was a different number. They changed the numbers last year.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

The Witness: It is the corner of Third and Santa Barbara, just about the corner there. I guess that is the address.

Mr. Connor: Q. Do you remember what the buildings were there, that is, the arrangement of the buildings?

A. Yes. It was an apartment built over garages.

Q. And the building you made the installation in was in the rear of another house, was it?

A. That is right.

Q. I will show you two photographs and ask you if you can identify those or if they recall anything to your mind?

A. Yes, that looks like it all right. That's it.

Q. Do you remember the type of room that this installation was made in?

A. Oh, she used it as a sewing room where the heater is. It was a sewing room at the time.

Q. And do you remember about how long that vent pipe was?

A. No, I don't know exactly.

Q. That is, not in exact feet?

A. Probably about 12 feet there.

Q. It went up through an upper apartment?

A. Yes.

Q. And can you describe the vent pipe, that is, how it was constructed?



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

A. Well, it was wrapped with asbestos, the four inch and then the three inch put through the four inch.

Q. That is, it slipped through the four inch?

A. Yes.

Q. And was there a space between the two pipes?      A. Yes.

Q. That is, one inside the other?      A. Yes.

Q. Do you remember the type of spacers that were in there?

A. Oh, I just used—I think I just used—I didn't put no particular spacers in there.

Q. Between the pipes, between the inner and outer pipes?

A. No, only at the bottom.

Q. At the bottom?      A. Yes.

Q. And in the top, too?

A. I don't think so. I never did, just shoved her up in there.

Q. Do you remember the type of spacer that was in there?      A. At the bottom?

Q. Yes.

A. Oh, I just took a piece of plumber's tape and made one out of corrugation, kind of a corrugation.

Q. And that vent pipe had asbestos on the outside?      A. Yes.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

Q. Was that vent pipe from the ceiling up to the roof just one section of pipe or more than one?

A. I don't remember any more. I don't know whether it was over 10 feet or not. I used to make them up in 10 foot lengths.

Q. 10 foot lengths?           A. Yes.

Q. According to your recollection, was there anything other than the spacer used between the inside and the outside pipes?           A. No.

Q. Just air space?           A. Yes.

Q. Have you any independent recollection of about when that job was done, about what year?

A. Well, I guess, let's see. Oh, I don't know, around I guess about '26, wasn't it, or '27?

Mr. Augustine: It must have been about 1926.

The Witness: Some place right in there. I just don't remember what year.

Mr. Connor: Q. Well, are you certain that it was prior to 1930?           A. Oh, yes; oh, yes.

Q. Have you ever had occasion to make any changes whatsoever in that vent pipe since it was first installed?           A. No.

Q. You don't recall whether there was a spacer at the top end of the vent pipe similar to the one at the lower end?

A. No, I didn't. I never used a spacer at the top.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

Q. You didn't. Well, is there anything on the top that serves as a spacer, any cap or anything like that, which serves as a spacer? A. No.

Mr. Owen: The answer is no?

The Witness: No.

Mr. Connor: Q. Did you personally make the pipe up? A. That's right.

Q. In your shop here? A. Yes.

Q. And how did you usually make it up, that is, the usual tube, the usual crimping of the outer tube and the usual crimping of the inner tube, is that the way it was made up, and one slipped inside the other?

A. Oh, I made some of them up with a flange on the bottom, with a collar on the bottom and then slipped it up through, and this particular one I didn't, though, but some of them I made with a collar soldered right on to the bottom and then had that collar for the spacer, see, and shoved her up through there.

Q. But you slid the inner pipe into the other pipe and just left it that way? A. Yes.

Q. You didn't fix one with reference to the other, you just slid it in and left it there?

A. That is right.

Mr. Connor: I think that is all.

(Defendant's Exhibit No. 1 Continued.)  
(Deposition of Albert E. Umbarger.)

Cross Examination

By Mr. Owen:

Q. You were just referring to a bottom collar or flange that would be something like a thimble?

A. Well, it is a regular stove pipe collar, you see, a three inch collar.

Q. Yes.

A. And I would just space it in the center and solder it at the bottom or rivet it on.

Q. But there were no layers of asbestos in between the inner and the outer pipe in your installation?      A. No.

Q. How long has it been since you have seen that installation about which you are testifying?

A. I don't suppose I have seen it in the last five years that I remember of.

Q. So far as you know, you don't know whether it is the same as it was five years ago or not today, do you?      A. No.

Q. You haven't seen it?

A. Well, according to that picture it looks the same.

Q. You don't know when that picture was taken?

A. No, I don't know when that was taken.

Q. Now, that outer pipe, does that run all the way through to the roof, or does it just run through the floor stringers?

A. It goes up a foot above the roof.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

Q. A foot above the roof? A. Yes.

Q. Did you ever make any tests on stacks of this kind to determine their efficiency?

A. I never did.

Q. You never checked their stack temperature or how long it takes them to get up to temperature?

A. No, I never did.

Q. You never did any of those things. That installation down there, today could you make another installation like it under the city rules?

A. No.

Q. It has been abandoned? A. Yes.

Q. Now, then, you have testified that you don't recollect what the construction is from the—we might say—bottom of the floor, showing the photograph Exhibit F, from there on up so far as it being one section or more than one section?

A. No, I don't remember any more.

Q. And so far as those photographs go, nobody else could ever tell unless they opened it up and took it out? A. That's all.

Mr. Owen: That is all.

#### Redirect Examination

By Mr. Connor:

Mr. Owen, this is not directly in the nature of redirect, but I just want to ask the witness:

Q. Mr. Umbarger, you have referred to inner

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Albert E. Umbarger.)

and outer tubes. Will you just state which tubes you are referring to according to the numerals on there (indicating)? What does 1 represent and what does 2 represent and what does 3 represent?

A. Well, No. 1 I would say would be the outer and No. 2 is the inner.

Q. No. 2 or No. 3?

A. Well, what's the difference? What would you call this?

Q. That lead line leads up there. No. 1 is the outer tube.

A. What is the difference between 2 and 3?

Q. That is probably a little confusing (indicating). Now, I just drew a lead line down from that. This part that shows right there, this 3 represents that pipe.

A. Yes. Well, then, it would be No. 3.

Q. No. 1 is the outer pipe and No. 3 is the inner pipe and what is No. 2 there?

A. It would be the spacer, evidently.

Mr. Connor: Yes.

(Whereupon the taking of the depositions was continued and adjourned to the hour of 10:00 o'clock a. m., February 16, 1938, at 2024 West 43rd Place.)

(Defendant's Exhibit No. 1 Continued.)

State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, Earl Umbarger, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 17th day of February, 1938.

[Seal]

WALTER M. PRATT

Notary Public in and for the County of Los Angeles, State of California.

(Defendant's Exhibit No. 1 Continued.)

(At 10:15 o'clock a. m., February 16, 1938, at 2024 West 43rd Place, Los Angeles, California, the taking of the depositions was resumed, all parties being present.)

Mr. Connor: This is pursuant to the adjournment of yesterday. I would like to have noted on the record that Mr. Baker has just removed the vent pipe which he yesterday testified as shown in Defendants' Exhibits C and D, and particularly Defendants' Exhibit D in the presence of Mr. Owen, counsel for plaintiff, Mr. R. F. Williams, a member of the plaintiff firm, Mr. Guenther and Mr. Connor, counsel for defendant.

(A discussion was had off the record.)

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BEN HENRY BAKER,

having been previously duly sworn, further deposed and testified as follows:

Direct Examination (Resumed)

By Mr. Connor:

Q. I hand you these two photographs, Mr. Baker, Defendant's Exhibits C and D for identification concerning which you testified yesterday. Do those photographs show the vent pipe which you have just removed?      A. Yes, sir.

Q. And is that the vent pipe which you say you originally installed and which has been in place ever since its original installation?

A. Yes, sir.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. In what year did you say that was installed?

A. That was in December, about the middle of December in '23.

Q. Will you take that vent pipe and describe its construction and the condition it was in as you just removed it?

A. As I removed it, I cut the straps, let it down and I found out that there was a little spacer that had fallen on the upper end of the pipe. Outside of that it seemed to be in good shape.

Q. What was the condition of the spacer at the lower end of the vent pipe, that is, the lower end of the outer tube?

A. It seemed to be apparently as good as when I installed it.

Q. And is there a spacer at the upper end of the outer tube?

A. Those that you see there, yes.

Q. That is, the spacer is intact on one side and broken off on the other side?

A. That is true.

Q. But the broken off portion you found at the upper end of the vent pipe?

A. Yes. Evidently it had been knocked off during the construction of putting in the pipe.

Q. That is, of inserting the inner tube into the outer tube?

A. Yes. And I might further state, too, why that was knocked out, by slipping this piece of pipe

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

from the heater up into this here (indicating) known as the concealed portion, I might have forced it up there and in bringing it down, knocked that spacer out of place.

Mr. Connor: I will now offer in evidence Defendant's Exhibits C and D for identification as Defendant's Exhibits C and D, and ask that the reporter so mark them.

Mr. Owen: Mr. Connor, you plan also to introduce the pipe?

Mr. Connor: Yes, I am going to offer that right now.

Mr. Owen: Then I have no objections to the pictures going in.

(Defendant's Exhibits C and D for identification were thereupon offered in evidence as Defendant's Exhibits C and D respectively.)

[See Book of Exhibits]

Mr. Connor: I will also offer in evidence the vent pipe just removed by the witness as Defendant's Exhibit G.

(The exhibit in question was thereupon marked Defendant's Exhibit G by the Notary.)

[See Book of Exhibits]

Mr. Connor: That is all.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Cross Examination

By Mr. Owen:

Q. Mr. Baker, when you said that you cut the straps to let it down, you mean the straps around the——

A. Outer shell.

Q. And those straps support the outer shell in position between the ceiling and the roof?

A. That is correct.

Q. Will you look at the bottom or lower section of this pipe that you have removed and now have in your hand? The first thing, working from the inside out, is an inner tube, isn't it?

A. Yes, sir.

Q. And then you come to what appears to be another tube?

A. You see, Mr. Owen, this portion here was put on, I might say, in the finish (indicating).

Q. That is the lower portion?

A. That is the lower portion. This joins onto what we call the concealed vent, this portion here (indicating).

Q. By "here," the witness indicates the upper portion of the pipe wrapped with asbestos; is that correct?      A. Yes.

Q. Now, isn't it true, Mr. Baker, that the lower section of exposed pipe of smaller diameter is probably slipped into another shell with the male joint on this lower section of smaller pipe?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. So that this lower section of pipe without a jacket around it, probably does not extend up into the wrapped or double wall pipe very far?

A. No.

Q. In Defendant's Exhibit D we have a reference numeral 3 which, in your earlier testimony you referred to as comprising the inner shell.

A. No. This here (indicating) wouldn't comprise the inner shell.

Q. You are referring now to 3?

A. To 3, yes.

Q. What would that be, Mr. Baker?

A. Let's see. I would say the inner shell, that is this one here (indicating).

Q. That isn't labeled on the drawing yet, is it?

Mr. Connor: No.

The Witness: Yes, it is either 1 or 2, isn't it?

Mr. Connor: No. 2 is the spacer.

The Witness: 2 is the spacer.

Mr. Owen: And No. 1, as I recall it, was intended to be the outer shell.

Mr. Connor: Yes.

The Witness: Well, No. 3 then is the continuation of this here inner shell (indicating).

Mr. Owen: Q. All right, then, isn't it true that we should have another reference numeral 4 which would lead to the inner pipe into which the member

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

3 is fitted with the male joint on the member 3?

A. Yes, that would be a good way of clearing it or designating it.

Q. Now, I have applied a reference numeral 4 to Defendant's Exhibit D which has a lead line running to a little exposed edge of the female joint of the inner shell; is that correct?

A. That is correct.

Q. Now, if you will look at the physical exhibit, at the part corresponding to that labeled 4 in Defendant's Exhibit D, that is the true inner shell, isn't it, in this particular construction?

A. Yes, that portion there (indicating) is the true inner shell.

Q. Now, the spacing member which is labeled 2 in Defendant's Exhibit D is soldered to that inner shell, is it not?

A. No, it is not soldered.

Q. Now, will you examine very carefully here where that spacer terminates on the inner section and examine that joint and tell me if that isn't a soldered joint.

A. No, sir, I wouldn't call that a soldered joint.

Q. And looking at the inside end of that spacer, isn't that a soldered joint at that point?

A. No, sir, Mr. Owen, I wouldn't call that a soldered joint. It might be such that the heat from this here (indicating)——

Q. By "here" you are referring to the inner pipe?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Mr. Connor: 3.

The Witness: From No. 3.

Mr. Owen: Q. Or 4?

A. 3 or 4. The heat created from the fire box of the hot water heater has fluxed this galvanized iron together making you think as if it was soldered.

Q. Well, it is actually soldered there now, isn't it? I don't mean at the various corrugations around it. I mean simply at the starting point where it contacts that inner shell it is soldered at the present time, isn't it?

A. No, I wouldn't say that it is soldered.

Q. Well, can you loosen it up with this knife without severing a soldered joint?

A. Yes, sir. That might be corrosion down there from the condensation.

Q. There appears to be in this physical exhibit another little plate or section of metal between the end of that spacer and the inner section labeled 4 in Exhibit D; what is that?

A. Well, that is the overlap of your crimp, of your piece here (indicating). See, this comes up here and turns back. That is one end, and comes over here and stops here (indicating). It seems to be the other end.

Q. If you will look at that a little more carefully you will find that there is another piece of metal there which terminates about three-quarters of an inch back from the edge which you have

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

turned up with the knife. Will you look where I am indicating with the pencil?

A. Yes, I see that.

Q. Have you any idea what that little piece of metal is?      A. No, I do not.

Q. Well, that little piece of metal to which we are referring appears to be soldered to the corrugated spacing ring end at that point, doesn't it?

A. No, I couldn't say it was soldered there. I wouldn't call that a soldered joint. It might be such a thing as just a piece of metal that has dropped down in there.

Q. In the present condition of these pipes there has been no relative sliding of the outer member No. 1 with relation to the inner shell No. 4, has there, Mr. Baker?

A. Well, Mr. Owen, I couldn't say about that now. As you notice, while making that connection on that heater, there is a possibility that this here inner shell could have been moved up and down by making this here connection down on the heater (indicating).

Q. You mean today?

A. No, when I installed the heater.

Q. Oh, when you originally installed it?

A. When I originally installed it.

Q. But my question simply went to whether there has been any relative movement of these parts today while you were taking it out.      A. No.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. Didn't that slide just then as you let that come down?

A. This here (indicating) slides just a little bit.

Q. By "this here," you are referring to the outer shell No. 1 sliding on the spacer labeled No. 2 in Exhibit D?

A. Yes.

Mr. Connor: Note on the record that the witness slid the outer shell down upon a spacer on the inner shell.

Mr. Owen: Also note on the record that the movement was limited by the straps which support the whole assembly in position between the ceiling and the roof.

Q. Now, Mr. Baker, let's look at the top end and tell me if this is not an accurate description of the condition we find?

A. Yes, it is.

Q. Well, I shall describe it in words and see if I convey an accurate word picture of what we find here: the inner shell which is labeled No. 4 in Exhibit D is heavily coated with soot, is it not?

A. Yes.

Q. The entire diameter of shell 4 is approximately three inches, is that correct?

A. Yes.

Q. Now, to your surprise as well as ours, we find lying across the opening of this inner shell, approximately one-half of the upper spacing member; is that correct?

A. That is correct.

Q. We also find that between the inner shell and the outer shell the one-half of the spacing member which remained in position; is that not correct?



(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. That is right.

Q. With the result that the inner shell 4 on the side opposite from that half of the spacer is in contact with the outer shell 1; is that correct?

A. In contact with the outer and inner shell.

Q. In other words, they are right together?

A. Yes.

Q. There is no space there at all?

A. No, sir.

Q. That is correct, isn't it?

A. That is correct.

Q. Now, assuming as I believe you described your installation of this pipe in the house, that you have placed the outer shell 1 in position between the ceiling and the roof and then you shove up the inner shell inside the outer shell and inside the spacer, the lower spacer, what is there to guide the inner shell inside the upper spacer except by chance having the pipe in perfect alignment?

A. You will notice that pipe as we buy it, this here comes in sections like this (indicating).

Q. Yes.

A. I don't slip this here inner shell in. That is already in, all put together (indicating).

Q. Yes.

A. It and the spacer. What I did is add on lower——

Q. Section 3?

A. Section 3 to the upper section 4.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. Oh, I see. So that you don't have to have any relative sliding between the inner and the outer shell and those spacers, they come all assembled?

A. They come all assembled, yes.

Q. I see. Well now, how do you account for the presence of this half of the spacer lying across the face, the open face of the pipe?

A. By making the connection, by making these connections here (indicating).

Q. You are referring to the connections between—

A. Between number 3 and 4, the connection onto number 3, see (indicating).

Q. Between the heater?

A. The heater, yes, and connection number 4.

Q. Yes. You mean the pipes lying between number 4 and the heater?

A. Yes. There is a possibility that I moved this pipe, shoved that up, you see.

Q. Shoved which up?           A. Number 4.

Q. Yes.

A. Shoved number 4 up, causing this here spacer, for me to drive this spacer out of place (indicating).

Q. I see.

A. That is what is out of place and it fell over, see.

Q. You mean the inner shell has fallen over against the outer shell so that it is in contact on one side?           A. Yes.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. And there is only one half of the spacer functioning?      A. Yes.

Q. Is that correct?      A. Yes.

Q. Well then, it also means too, doesn't it, that the inner shell must have been pulled down far enough that one edge of it, that is number 4, could get underneath that spacer and cut it in two as it appears to have done?

A. That might have happened.

Q. Well, do you see any other way that that could be up there on top unless the inner shell had cut it in half and left it there?

A. Well, during construction before I installed it, it might have been knocked loose or broke or something and by carrying it into the attic or putting it up there, it might have broke it loose and fell off, you see, and just caught there.

Q. Yes, but how far down is that spacer, the half of it that is in place?

A. Well now, it is down there quite a ways. I would say about three inches.

Q. Three inches down the outer shell?

A. Yes.

Q. Isn't it about two inches?

A. Yes, about two inches.

Q. It is evident, isn't it, that the parts have been badly displaced during installation?

A. Yes.

Q. Now on further examination of this pipe, you

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

don't find any layers of asbestos between the inner and the outer shell, do you?      A. No.

Q. Either to space it or to act as an insulating medium?      A. No.

Q. From examining the upper end of Exhibit G, are you able to tell whether the inner shell number 4 had a male or female joint with the section to which it was attached at the top?

A. No, I am not without I would be allowed to touch that and feel whether it is corrugated or not.

Q. Well, if we can have that flash light, now will you make as good an examination as you can here?

A. No, I can't tell on account of the soot.

Q. There is so much soot?      A. Yes.

Q. Are you able to tell with respect to the outer casing?

A. No. Evidently it looks as if it was the end of the pipe.

Q. Well now, at this top joint which we are referring to now, what did that connect into?

A. Into the roof flashing.

Q. And then?

A. Slipped up through the roof, through the jacket, the roof jacket to prevent the wind and rain and stuff from entering down into the attic.

Q. And then where did the gases of combustion passing up through the inner shell four go after they left the end of it here (indicating)?

A. This end here (indicating).

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. You are referring to the outer shell?

A. The outer shell, yes, it fits right up into a flange, a roof flange, see.

Q. Yes. Your gases of combustion then passed directly into a fitting, fitted to that roof flange?

A. Yes, sir.

Q. So that there was no pipe, flue pipe or otherwise which fastened onto the end of the inner shell four at the top, was there?

A. No, no pipe connection there.

Q. There couldn't have been in view of this half of the spacing member being in the position directly across the face, could there?

A. No, there could not.

Q. Well then, that left a condition that if the flue gases coming up through the inner shell four had been heavy, or some other wind coming down, they could have come over the top of the inner shell four, down into the space between the inner shell and the outer shell and then back down that jacket and out into the room through these perforations in the ceiling plate shown in Exhibit D?

A. No, I wouldn't say that because this outer jacket was supposed to fit into that roof flashing tight.

Q. That is still true, but my question is this: there is clear and open communication between the inner flue pipe which we have labeled four—

A. Yes.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. —and the outer shell at the top, isn't there?

A. Yes.

Q. And there is nothing there to impede the passage of gases from the inner shell four into the jacket space formed between it and the outer shell, is there?           A. No.

Q. And there is nothing to impede the passage of air or gases or anything else down through that outer shell and out through the perforations which I shall label 5 in Defendant's Exhibit D? Will you read the question?

(The question was read by the reporter.)

The Witness: That is right.

Mr. Owen: Q. And I understood your testimony yesterday to be, Mr. Baker, that this type of installation will not comply with the present ordinances?           A. Not on new installation.

Q. Yes.           A. No.

Q. Where it is in you don't have to tear it out?

A. No. Where it is in, if we want to hook onto another heater, we can make another connection.

Q. Now, for instance, in replacing your flue, when you take this away, you couldn't put in another one just like this?           A. No.

Q. It wouldn't pass?

A. That is my understanding of the ordinance.

Q. Your understanding is correct as I understand it.           A. Yes.

(Defendant's Exhibit No. 1 Continued.)  
(Deposition of Ben Henry Baker.)

Redirect Examination

By Mr. Connor:

Q. Mr. Baker, when gases are escaping through a vent pipe, it is only when the heat is on, isn't it, when the flame is burning? A. That is all.

Q. And does the temperature of the vent pipe get very high? A. No.

Q. It gets rather hot, does it?

A. Oh, it gets rather hot, yes.

Q. And I suppose you have been in the heating business long enough to know that hot air always travels upwardly? A. Absolutely.

Q. Would or would not the heating up of the vent pipe in the tendency of the hot air resulting from it, traveling upwardly, prevent cold air or gases from traveling downwardly through the space between the tubes?

A. Will you give me that question again, please?  
(The question was read by the reporter.)

The Witness: Yes, that would let the cold air traveling down there circulate.

Mr. Connor: Q. You say it would let the cold air travel down or stop it off?

A. No, that inner and outer jacket there, the spacing in there would create a circulation of air in between.

Q. Upwardly or downwardly?

A. Upwardly.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. When you made this installation did you solder or fix either of the spacers to either the inner or the outer tube?      A. No, sir.

Q. In making your connection between the heater and the inner tube of the vent pipe, the upper section which carries the asbestos, is it or is it not necessary to move the inner tube upwardly or downwardly?      A. It is at times, yes.

Q. And that might have been done in the case of the installation of this vent pipe?

A. It is possible, yes.

Q. That is, there is nothing in this construction to prevent a longitudinal moving of the inner tube relative to the outer?

A. Nothing to prevent it, no.

Q. Looking at Defendant's Exhibit D, would you or would you not say it was necessary to move the inner tube of the upper asbestos covered section longitudinally?      A. I would.

Q. You would say so?      A. Yes.

Mr. Owen: Under what conditions?

Mr. Connor: Q. In making the installation?

A. In making the installation on this connection, as Mr. Owen said he would label it No. 4 or No. 5.

Mr. Owen: My reference numeral 5, Mr. Baker, was going to these holes in the ceiling plate.

The Witness: I am mistaken, then. I thought you referred to these connections, these elbows here or these fittings.



(Defendant's Exhibit No. 1 Continued.)  
(Deposition of Ben Henry Baker.)

Mr. Connor: Let's number that 6 (marking photograph). Now, will you read what we have?

(The desired testimony was read by the reporter.)

Mr. Connor: Q. To complete my question, Mr. Baker, the question was, would it be necessary to move the inner tube of the upper asbestos covered section longitudinally relative to the outer tube in making the connection as shown in Exhibit D, the connection to the heater as shown in Exhibit D?

A. In some cases I would say yes.

Q. Well, would you say in this case as shown in Exhibit D?

A. I would say yes, in this case. I will say that it was necessary to move that, or I did move it in making that connection.

Mr. Connor: That is all, I think.

#### Recross Examination

By Mr. Owen:

Q. However, Mr. Baker, in removing these elbows marked 6 this morning, preparatory to removing sections 3 and 4 and 1, no longitudinal or vertical movement was made, was there, at that time?

A. None to speak of.

Q. Because these elbows had sufficient flexibility and they were sufficiently out of line that you could weave them out, is that correct?

A. That was correct in this case, Mr. Owen, but—

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

Q. Now, you——

A. But may I add?

Q. Yes.

A. This heater that I have in there at this present time has been there in the last seven years. This vent has been installed, we will say, about fourteen years. I have changed heaters here, you see, and changed these connections but not the concealed part or this exhibit (indicating) and it might have been when I made the other connection I moved it more.

Mr. Connor: Referring to Exhibit G.

Mr. Owen: Q. It might have been?

A. Might have been, yes.

Q. Now then, you spoke about temperatures of the vent pipe. How hot should a vent pipe on a gas heater or any other kind of a gas appliance run to operate efficiently?

A. Well, Mr. Owen, that is kind of hard to say. It all depends on your heater, your burner and how many B.t.u's you are throwing through your burner. That question I couldn't answer, how hot it would be.

Q. Well now, take your heater right here that this pipe was used on. What stack temperature would you have there? You are a heating expert.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of Ben Henry Baker.)

A. Well no, I wouldn't say I am a heating expert and I couldn't answer that question to a degree that would be correct. No, I am not a heating expert. Plumbing is mostly my line.

Q. Well, this pipe you testified was purchased with the asbestos wrapping on the outside of the outer shell and then the spacers and the inner shell just in an assembled unit, is that correct?

A. No. Let me get it clear to you, then. This here outer section and the inner section and the spacers were purchased all in one.

Q. That is what I am saying.           A. Yes.

Q. And that has passed off the market now?

A. Yes.

Mr. Owen: That is all.

Mr. Connor: Q. At the time you purchased this section of vent pipe, Mr. Baker, as shown in Defendant's Exhibit G, was that the type of vent pipe commonly sold and used at that time?

A. Yes, sir, it was.

Q. And to your knowledge, was there very much of it used during that period of time?

A. A lot of it.

Mr. Connor: That is all.

(The taking of the depositions was then continued and adjourned to the hour of 3:00 o'clock p. m., at 6246 Santa Monica Boulevard, Los Angeles, California, on the same day.)

(Defendant's Exhibit No. 1 Continued.)

State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, Ben Henry Baker, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 17th day of February, 1938.

[Seal]

WALTER M. PRATT

Notary Public in and for the County of Los Angeles, State of California.

(Defendant's Exhibit No. 1 Continued.)

(At the hour of 3:00 o'clock p. m., of the same day, the taking of the depositions was resumed at 6246 Santa Monica Boulevard, Los Angeles, California, all parties being present.)

E. ELSIE EVANS,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Connor:

Q. Will you state your full name and address, Miss Evans—is it Miss or Mrs.?

A. Miss Evans, E. Elsie Evans. This address or at home?

Q. No, this address.

A. 6246 Santa Monica Boulevard.

Q. And what is your business?

A. Beauty operator.

Q. And this place where we are now is your beauty shop?      A. Yes, sir.

Q. I show you two photographs, Miss Evans, marked Defendant's Exhibits A and B for identification, and ask you if you know what those photographs are?

A. Well, they are a vent and hot water heater.

Q. Are they photographs of the heater here in your place of business?      A. Yes, sir.

Q. And the vent pipe extending up through the ceiling?      A. Yes, sir.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

Q. Were you present when the photographer took these photographs?      A. Yes, sir.

Q. Was this piece of paper there put up in your presence with W.J.F. on it?      A. Yes.

Q. And to your knowledge, how long has the vent pipe shown in these Exhibits A and B, been installed in this building?

A. As long as I have been here.

Q. How many years is that?

A. Since 1920.

Q. You have been continuously in business since that time?      A. Yes, sir.

Q. Has the vent pipe ever been changed since you have been here?

A. Not to my knowledge.

Q. If it had ever been changed you would have known of it, wouldn't you?      A. I think so.

Q. And as I understand it, Miss Evans, you do not want us to remove the vent pipe?

A. I would rather it would not be removed.

Mr. Connor: That is all.

#### Cross Examination

By Mr. Owen:

Q. Miss Evans, you say you would rather it wouldn't be removed. This vent pipe according to your testimony appears to be at least 18 years old, and you wouldn't just as soon have a new one put in there without any cost to you?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

A. I would rather it would not be removed.

Q. Do you have any real objection to its being removed?

A. It works perfectly and I would rather not be inconvenienced.

Q. But you have no particular reasons, just the inconvenience?

A. I would rather it wouldn't be removed.

Q. The owner of the building has no objection to its being removed, has he?

A. I don't know.

Mr. Owen: I want to renew my objection to this testimony and that of any other witness relating to the installation of the flue at this address on the ground that we are not getting the best evidence.

Q. Miss Evans, were you present when that flue was installed?      A. I was not.

Q. So that you have no idea at all as to what the construction is except what you can see as shown in these photographs, Defendant's Exhibit—

A. It works beautifully.

Q. Just let me finish the question. Will you please read the question as far as I have gotten?

(The question was read by the reporter.)

Mr. Owen: Q. —Defendant's Exhibits A and B for identification? Do you have the question clearly in mind?      A. No.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

Mr. Owen: Will you read the question?

(The question was read by the reporter.)

Mr. Connor: I object to the question on the ground it is not proper cross-examination. This witness is not produced for the purpose of proving what the structure is, but merely how long the particular structure has been here.

Mr. Owen: The construction is in her house. I am entitled to ask her if she knows anything about it. Answer the question. Do you understand the question, Miss Evans?

A. I don't believe I fully understand what you want me to say to you.

Q. Let me ask it a different way. You weren't here when the pipe was put in, were you?

A. No, it was here.

Q. All right, just stop right there. Now, then, have you ever had it out since you have been here?

A. Not to my knowledge.

Q. So that you have never seen the pipe except what you can see from standing on the floor and looking at it?

A. Yes.

Q. That is correct?

A. Yes.

Q. So that you have no idea as to what the construction is except what you can see from the floor?

A. I don't know anything about construction work.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

Q. And you have no idea, therefore, of this construction because you haven't examined it?

A. I see it.

Q. But beyond what you can see just as I am standing here and I can see, you don't know any more about it than I do, do you? Answer that yes or no. That is easy to answer.

A. Well, it is rather an odd question to ask me.

Q. No, it isn't odd. You are under oath. Will you please read the question to the witness again?

Mr. Connor: I think, Miss Evans, what counsel means is——

Mr. Owen: I would just as soon you didn't prompt her.

Mr. Connor: You don't know anything more about the pipe than just what you see from the floor; you don't know how long it is or what it is made of or anything?

The Witness: I don't know. The pipe is there and I have identified the picture that I have seen it, and I saw the picture taken.

Q. But you don't know any more about it but what you can see or I could see by standing there, do you?      A. No.

Q. Miss Evans, when you first light the heater or it is an automatic, isn't it?      A. Yes, sir.

Q. And when it first goes on, there is a gas smell, isn't there?      A. No.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

Q. There is never any gas smell?

A. There might be when——

Q. When it is first lighted?           A. No.

Q. When is it?

A. When the pilot is on and the water cools and the flame goes on again there might be a trifle of a smell.

Q. Well, in other words, that is——

A. Not when I light it.

Q. No, but that has been when it is off and the thermostat gets to where it calls for heat, during that interval of its getting underway again, that is when you notice the gas smell?           A. Not often.

Q. But you do notice it or have noticed it?

A. I thought I answered that.

Q. Yes or no. Just say you do notice it or you have not noticed it. It doesn't help the other side by your hedging on these answers.

A. No, it isn't that, sir.

Mr. Connor: I object, Counsel.

The Witness: It isn't that. The questions are asked me but I didn't know I was going to be called upon to answer about the construction of a pipe, a vent that goes up off from a boiler for I don't install boilers and as far as my lighting the gas goes, there might be a possibility as it goes on that I smell a little gas but I don't smell it because when I go there, it is on.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

Q. The heater is going and it is all right?

A. It is on.

Q. But you do smell gas when it first goes on after it has been off?      A. Sometimes.

Q. Yes, that is all.

A. But I don't say yes because it is only sometimes.

Q. Yes.

A. It doesn't always.

Mr. Owen: That is all.

Mr. Connor: Just one more question, please.

#### Redirect Examination

By Mr. Connor:

Q. Miss Evans, is the heater and installation and so on your property or the property of your landlord?      A. The heater is mine.

Q. The heater is yours?      A. Yes.

Q. And the other fixtures here are yours?

A. Yes, sir, everything is mine in here.

Q. And I understand you purchased these things when you moved into the place. The heater was installed and the vent pipe?

A. The heater was here. Of course a great many things have been added to this place since I bought it, but I got it in 1920 and it is a very small place.

Mr. Connor: I now offer in evidence Defendant's Exhibits A and B the photographs heretofore iden-

(Defendant's Exhibit No. 1 Continued.)

(Deposition of E. Elsie Evans.)

tified as Defendant's Exhibits A and B for identification.

Mr. Owen: I object to the introduction of these photographs in evidence on the ground that they are not the best evidence of the construction they purport to show.

(Defendant's Exhibits A and B for identification were thereupon offered in evidence as Defendant's Exhibits A and B.) [See Book of Exhibits]

(The taking of the depositions was continued and adjourned to the hour of 3:30 o'clock p. m. of the same day at 6244 Santa Monica Boulevard, Los Angeles, California.)

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State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, E. Elsie Evans, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

(Defendant's Exhibit No. 1 Continued.)

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 17th day of February, 1938.

[Seal]                      WALTER M. PRATT

Notary Public in and for the County of Los Angeles, State of California.

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(At the hour of 3:30 o'clock p.m., February 16, 1938, the taking of the depositions was resumed at 6244 Santa Monica Boulevard, Los Angeles, California, all parties being present.)

WILLIAM J. FOX,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Connor:

Q. State your full name and address, Mr. Fox?

A. William J. Fox, 6244 Santa Monica Boulevard.

Q. That is the address of your place of business where we are now?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. That is my address and I live in the rear, back there where I stay.

Q. And what is your business?

A. Plumbing.

Q. And the place where we are now is your plumbing establishment, is it?

A. Yes, the Fox Plumbing and Heating Supply.

Q. How long have you been in business at this location?

A. At this location about eight years.

Q. How long have you been engaged in the plumbing business?

A. About 14 years, I think.

Q. In connection with your business, do you make installations of hot water heaters and vent pipes?

A. Yes, that is most of our business.

Q. Have you examined the vent pipe at 6246 Santa Monica Boulevard?

A. Yes, I have looked at it.

Q. That is the beauty shop operated by Miss Evans?      A. Yes.

Q. Are you familiar with the hot water heater and vent pipe installed at that location?

A. Yes, I have seen the installation, looked at it a number of times.

Q. And to your knowledge, how long has that vent pipe been installed?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. Well, I know it has been here eight years, as long as we have been here and in this store, but I was in Louis' other store down below for three years and it was in then.

Q. Who is Louis?

A. Mr. Jacobs, the owner of the property here.

Q. Do you do any work for Mr. Jacobs?

A. Yes, we have done most of his plumbing any time he has had any done.

Q. During this eight year period of time you mean?      A. Yes.

Q. Does that include the property at 6246 Santa Monica Boulevard?

A. Yes, we have done work for her in there, too.

Q. Have you done any work on the vent pipe at that address?

A. No, we have never done anything on it.

Q. Have you ever had occasion to examine the vent pipe?

A. Yes, I have looked at it a number of times.

Q. I show you two photographs, Defendant's Exhibits A and B, and ask you if you know what those are?

A. Yes, these are the photographs taken the other day.

Q. Of the heater and vent pipe installation at that address?      A. Yes.

Q. Can you describe the construction of the vent pipe that extends through from the ceiling to the roof?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. Well, it is originally the old vent piping that we had in Los Angeles here. It is one four inch piece of pipe on the outside, covered with asbestos and the three inch goes in on the inside and is kind of dovetailed so there are air spaces around it. Most of the time when we run into those, when you pull the three inch end out of there, why, the three inch comes down out of it and then according to the ordinance we are supposed to repair it and when we put it back it is a repair job, so we can usually sell them a new vent. That is what most of us do now when we run into those, is sell them a new vent.

Q. How long has the so-called new ordinance been in effect, approximately?

A. Well, just offhand I imagine it has been about eight years since they changed that.

Q. Now, when you say dovetailed, are you referring to this shown on Exhibit B (indicating)?

A. These little pieces are cut with a snip. One end is bent out and the other is bent in, so it makes kind of a spacer every five-eighths or three-quarters of an inch to the pipe, so a circulation of air goes up in through there. It takes the place of the vent bucket now that we put in with holes around in it.

Q. Have you examined that vent pipe where it comes through the roof of the building?

A. Oh, yes.



(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

Q. And is it the same construction on the upper end as is shown here at the lower end on Exhibit B?

A. Well, the upper end I don't think has the dovetailing; usually it just comes right straight up through the top of the flashing, but that flashing has been pulled off up there and that ought to have been fixed back. They have shoved the pipe up so far they have kicked the weather cap off on the side.

Q. Well, do you know whether there is an air space between the inner and outer pipe continuing through from the lower end shown on Exhibit B to the roof?

A. Yes, that goes right on through but it may lay against the four inch pipe up at the top there sometimes because it is seldom that we bother to dovetail them on top. If the bottom is done, that is where they look, most of them, when it is inspected.

Q. Does the inner pipe slide through there relative to the outer pipe?

A. Yes. Lots of times the pipe that goes on the heater can be shoved clear up through there. That is, if you dovetail the four inch, you know, so it leaves the air space there.

Q. Is it necessary in making connections of the heater pipe with the vent pipe to slide the inner pipe vertically with reference to the outer pipe, move it up or down?

(Defendant's Exhibit No. 1 Continued.)  
(Deposition of William J. Fox.)

A. I don't just understand what you mean.

Q. In making your connection of the pipe designated 3 on Exhibit B with the heater or of the heater pipe with the inner pipe of the vent pipe, is it necessary to move the inner pipe up and down in making your connection?

A. Well, sometimes on those water heaters you have a ten foot length that you can set right on it and shove it right on up into the vent, one continuous piece which makes the best job, but with so many of these vents right in the ceiling is where it stops and then you have to take and flute the top of the other one so it fits into that one. But where you take the heater vent pipe down, why, lots of times that will be pulled down and then that is taken and if you replace the heater why, of course you have to replace that up through there. The inspectors usually look and see that that does go through the roof, though.

Q. To your knowledge, how long have vent pipes like those shown in Exhibits A and B been installed in Los Angeles?

A. Well, long before I was in business they had those kind of vents in and I know unless you really disturb it, why, we can still hook to them and they can't make us change them.

Q. Have you seen many installations of those vent pipes in making repairs?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. Well, we have changed quite a number of them. We have taken and put the Los Angeles vent in because, just as I explained before, if that inner pipe drops down, to put it back it is technically a repair job, and to repair one of those vents you have to repair it and bring it up to the ordinance. So if the customer can stand it, ordinarily we say, "Well, we have to repair it and we will have to put in a Los Angeles vent there which will be safer than this is."

Q. Did you put your initials on that paper, W.J.F.?

A. Yes, those are my initials.

Q. But you can still otherwise identify these photographs as the installation at 6246 Santa Monica Boulevard?

A. Yes.

Mr. Connor: I think that is all.

### Cross Examination

By Mr. Owen:

Q. Mr. Fox, you testified you had examined this installation on a number of occasions?

A. Yes.

Q. Have you ever had it out? Have you ever had the inner pipe down and out?

A. Well, I can't remember how long ago, but I didn't take it down myself.

Q. Somebody else took it down?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. Yes, one of the boys from the shop took it down because the heater was sooted up and they took it down.

Q. Sooted up so badly——

A. They took it out through the top of the roof. They raised it up this way (indicating) and blew down it and shook it so they would have some circulation.

Q. You mean this way, up and down (indicating)?

A. Yes, up and down. They pulled it up through and shook the soot out of it.

Q. It was so badly sooted the heater wouldn't work, was that the trouble?

A. That was a part of it. The heater was really limed up.

Q. Well, how recently was that repair made?

A. That was about, oh, between six and eight years—five and eight years ago.

Q. Have you any better way of fixing the date than that?

A. I can't remember just when it was.

Q. You don't know whether it was 1930, '31, '32, '33 or what year?

A. No, it is hard for me remember just when it was. I was trying to think of the incident when she had her leg broke. No, it wasn't that time. She had her leg broke and I was trying to connect it up with about the time.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

Q. But you didn't do the job yourself?

A. No, I didn't. I had the man go up there.

Q. But you weren't present?

A. I was trying to think if it was Bill Keefe—  
no, it was Ross Nixon that did it.

Q. And you weren't present?           A. No.

Q. Now, then, if you will take these photographs, Defendant's Exhibits A and B, if you look at Exhibit B, for instance, you are not able to tell what the balance of the construction is between the ceiling and the roof, are you, just from looking at that picture?

A. No, I know what is in there but you can't see anything other than what is right on the ceiling.

Q. Yes. The only way to find out what is in there is to take it out, isn't it?

A. No, I don't think you would have to take it out.

Q. What would you do?

A. Well, I think you can see right up through here. There is the air space that you can see right up in there. If you get your head up close to that pipe there you can see air right through.

Q. An air space around that pipe?

A. Yes.

Q. Labeled 3?           A. Yes, that is right.

Q. It runs right through to the roof?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. But there is no way of seeing what is beyond this piece of pipe. That is out in the attic there.

Q. There is no way of seeing beyond there?

A. No.

Q. There isn't any way of seeing that without taking the four inch piece out?

A. Yes, that is what I mean.

Q. You have never taken that out?

A. No, it has never been taken out since it was originally installed. That is a permanent piece that is in there.

Q. Are you familiar with what plumbers call a thimble?

A. Spacers is what we call them.

Q. Yes. They have perforations around it to space a piece away from the walls of an opening?

A. Yes, like I showed you the other day, you mean?

Q. Yes.

A. They have a piece of tin that is bent about three-quarters of an inch so that it leaves a three-quarters of an inch space around there for circulation.

Q. Yes.

A. We just call them spacers, to hold—well, the thimble as you say—to hold the thimble away from the side of the tin.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

Q. Well, that is about what that four inch outer piece constitutes here, isn't it, with those fingers bent in, or what you call dovetailed fingers, it is really a permanent thimble, only long enough to reach from the ceiling to the roof with those bent in fingers at the bottom to space that inner flue pipe number three?

A. No, that wouldn't be considered a spacer. That would take the place of the terra cotta pipe on your vents now. That really takes the place of the regular Vitex or terra cotta that we are supposed to put in the attic and on the inside of that. Of course the three inch goes up inside the terra cotta.

Q. Yes, but in this instance, there are no layers of asbestos between that three inch pipe and the outer four inch pipe, are there?

A. No, not between the three inch, but the asbestos is on the outside of the four inch pipe.

Q. Yes.

A. Which makes it fire proof like they use the terra cotta for now.

Q. But it has no insulating value so far as that three inch pipe is concerned because it isn't around it or adjacent to it?

A. No, there is no insulation on the inside. The only reason the asbestos is on the outside is in case it does go against some wood, why there would be

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

that much protection and conserve the heat in the tin.

Q. Well, all constructions of that sort have now been abandoned, haven't they, under the new rules?

A. Well, they can't make them take them out when they are in there. They can't make them take them out and there is a number of them in yet.

Q. Still in?           A. Oh, yes.

Q. But they are not a satisfactory installation now according to the new rules or city ordinances?

A. Well, they are just about as safe as the way they put in some of these with the city ordinance as far as safety is concerned, with that asbestos on the tin. But one reason they changed it to a real four inch vent is because they had water heaters that had to have a four inch vent and they would take the inner pipe out and shove the four inch vent right into them. That is one reason why the city wanted to discontinue them. You see, they are really built as a three inch vent. That is only a three inch vent. That outer pipe is insulation, and so what they did was to make an ordinance whereby they really made a four inch vent. Then they could either use a four inch vented fixture on it or a three inch one. Some of the manufacturers here in town had water heaters that they couldn't reduce to three inch. When they would run into a vent like this, why they would not have it inspected and they



(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

just pulled the inner pipe out and just shoved the four inch vent up into it. That really made a dangerous vent because that would get hot enough and if the asbestos was torn off it would char the material it is against.

Q. Now you cannot make an installation like that next door, can you?

A. No, but we can't make them take them out.

Q. But it is an obsolete practice, isn't it?

A. Yes, it is. You must renew them or repair them.

Q. Well, that outer pipe there, the four inch pipe with the asbestos on the outside of it, I suppose that is cut on the job to form these little dovetail vents—not vents but fingers or tabs. The man cuts that on the job, does he, and bends them and then uses the ones——

A. That is right. They are cut ordinarily right on the job. You see what you can nail to. Sometimes there will be quite a long one to be able to reach something that you can nail onto if they don't have a piece of wood collar or something there to nail to. We used to buy them in 10 foot lengths, already wrapped.

Q. Wrapped on the outside with asbestos?

A. Yes, and we would take the hack saw and saw off the length we wanted to and just dovetail the edges out and tack it in.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

Q. By dovetailing the edges out you mean like is shown in Exhibit B?      A. Yes.

Q. Those fingers pointing in and out?

A. Yes, that is right.

Mr. Owen: That is all.

### Redirect Examination

By Mr. Connor:

Q. After your examination of the vent pipe shown in Exhibits A and B, is there any question in your mind that the 2 concentric pipes spaced from each other extend through to the roof in the manner as shown in Exhibit B in the same spaced relation?

A. Well, do you mean that the bottom of it would be, say, three-quarters of an inch and the top would be exactly the same?

Q. Well, approximately so.

Mr. Owen: The witness has already testified that at the top he thinks it is probably lying over to one side.

The Witness: It may lie over to one side or the other because there was not so much of the care taken on the top as on the bottom in having that space because the circulation of air should go up, and when it gets up there it is a lot colder than down there (indicating).

Mr. Connor: Q. Would you mind going up on the roof there, Mr. Fox, and taking a look at the upper end and verifying that point as to how it

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

comes out at the upper end?

A. It sticks right through the roof now.

Q. Yes. You can see whether or not the upper end is the same as the lower end shown in Exhibit B.

A. Do you mean to——

Q. Whether it is the same finger arrangement, what you call the fingers and spacers there, whether the top is the same as the bottom shown in Exhibit B.

A. Yes, I will look up there.

(A short recess was taken.)

Mr. Connor: Note on the record that the witness, Mr. Fox, went up on the roof and examined the upper end of the vent pipe shown in Defendant's Exhibit B together with counsel for plaintiff.

The Witness: Well, the upper end is practically the same as the bottom end. It is all dove-tailed, as you call it. It has been shoved over a little closer to one side than it is to the other.

Mr. Connor: Q. And is there anything there to indicate to you that the inner pipe is slidable in the outer pipe; is there anything to indicate from your inspection just made that the inner pipe is slidable with reference to the outer pipe?

A. Well, it looks as though that inner pipe has been raised up far enough so that that cap doesn't fit over the top of it.

Mr. Connor: That is all, I think.

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

Recross Examination

By Mr. Owen:

Q. How much would it cost to replace that vent so that you could get those parts out of there to use as an exhibit in this case?

A. Well, we would put in a bucket. We charge \$3.75 for the vent bucket, cap and spacer, and there would be a piece of Vitex that goes up through here (indicating). I don't know how high that attic is.

Q. Just an approximate figure.

A. There would be about four hours labor. About \$10.50, something like that.

Q. About \$10.50?      A. Yes.

Q. It wouldn't be a particularly hard job in this case because everything is exposed. It is easy to work there, isn't it?

A. Well, the only hard part would be the length of the Vitex up through the attic. If it is more than one length why it is hard to cement the piece and then shove it up in and then put the bucket up and nail the bucket in.

Q. That Vitex is sort of a cementitious product, is it?

A. Well, it is cement wrapped paper. It is concrete pipe made out of asbestos, that is what it is, cement and asbestos.

Q. And to get a flue that will pass inspection, each section has to be cemented, doesn't it?

(Defendant's Exhibit No. 1 Continued.)

(Deposition of William J. Fox.)

A. If you happen to have one longer, you have to have a coupling and cement that joint up in there.

Q. It makes a difficult installation sometimes?

A. Yes, sometimes they are pretty hard to put in unless you can crawl right into the attic. Then of course you can work on it.

Q. Do you know whether or not the owner had any objection to that vent being taken out?

A. I wouldn't think he would have. I haven't talked to him myself. I have been out all morning. I haven't talked to him.

Mr. Owen: That is all.

Mr. Connor: That is all.

(A discussion was had off the record.)

Mr. Connor: Both parties stipulate that signatures by the witnesses may be waived.

Mr. Owen: Except in the event of any question or inability of counsel to agree on apparent discrepancies in the record, and such parts will be submitted to the witness for verification.

Mr. Connor: All right. By stipulation of counsel it is also agreed that Mr. Owen may transport Defendant's Exhibit G to San Francisco.

Mr. Owen: And have it available for counsel for inspection before the trial, and otherwise produce it at the trial.

(Defendant's Exhibit No. 1 Continued.)

State of California,  
County of Los Angeles—ss.

I, Walter M. Pratt, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, William J. Fox, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 17th day of February, 1938.

[Seal]                      WALTER M. PRATT,

Notary Public in and for the County of Los Angeles, State of California.

(Defendant's Exhibit No. 1 Continued.)

[Title of District Court and Cause.]

ORDER RE TAKING OF DEPOSITIONS DE  
BENE ESSE ON BEHALF OF DEFEND-  
ANTS.

The motion of defendants for an order to take depositions De Bene Esse, pursuant to Sections 639, 640 and 641, Title 28, of the United States Code, having come on to be heard, the parties being represented by counsel in open court, and it being represented to the Court that the testimony of the named witnesses is material to the issues raised by paragraph XII of defendants' first amended answer and that these witnesses live at a greater distance from the place of trial than one hundred miles, and the Court being fully advised in the premises,

It is hereby ordered:

That the depositions of the following named witnesses, and perhaps others, may be taken De Bene Esse, pursuant to the provisions of Sections 639, 640 and 641, Title 28, of the United States Code:

George E. Augustine, Los Angeles, California.

A. J. Hartfield, Los Angeles, California.

El Roy L. Payne, Los Angeles, California.

Mrs. Etta Shearer, Los Angeles, California.

Mrs. E. E. Evans, Los Angeles, California.

William J. Fox, Los Angeles, California.

Louis S. Jacobs, Los Angeles, California.

Ben Baker, Los Angeles, California.

Morris Faierman, Los Angeles, California.

(Defendant's Exhibit No. 1 Continued.)

Signed at San Francisco, California, this 18th day of August, 1937.

(Signed) HAROLD LOUDERBACK,  
District Judge.

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[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITIONS DE  
BENE ESSE ON BEHALF OF DEFEND-  
ANT.

To the above named Plaintiff, Williams-Wallace Company and to A. Donham Owen, Esq., its attorney:

You and each of you will please take notice that on the 15th day of February, 1938, commencing at the hour of 10 o'clock A. M., at the office of William L. Connor, 1008 Pershing Square Building, 448 South Hill Street, Los Angeles, California, the above named Defendant, Payne Furnace and Supply Company, Inc., will proceed to take the depositions de bene esse of the following named witnesses on its behalf:

A. J. Hartfield, 7615 Roseberry Avenue, Huntington Park, California;

El Roy L. Payne, 338 North Foothill Road, Beverly Hills, California;

Mrs. Etta Shearer, 4022 Third Avenue, Los Angeles, Cal.

Mrs. E. E. Evans, 6246 Santa Monica Boulevard, Los Angeles, California;



(Defendant's Exhibit No. 1 Continued.)

William J. Fox, 6238 Santa Monica Boulevard,  
Los Angeles, California;

Louis S. Jacobs, 521 South Serrano Avenue,  
Los Angeles, California;

Ben Baker, 2024 West 43rd Place, Los An-  
geles, California;

Morris Faierman, 2522 Folsom Street, Los  
Angeles, Cal.

The said depositions will be taken before P. S. Noon, a Notary Public in and for the County of Los Angeles, State of California, under the provisions of Sections 639, 640 and 641, Title 28 of the United States Code and pursuant to an order of the above entitled court made and entered herein on the 18th day of August, 1937.

The examination will be continued from day to day until completed and adjourned from place to place as expedience may require.

You are invited to attend and cross examine the witnesses.

Dated at Los Angeles, California, this 29th day of January, 1938.

WM. L. CONNOR,  
Solicitor and Counsel for Defendant.

Service of copy of the foregoing Notice is acknowledged this 31st day of January, 1938.

A. DONHAM OWEN,  
Solicitor and Counsel for Plaintiff.

[Endorsed]: Defendant's Exhibit No. 1. Filed Mar. 1, 1938. Walter B. Maling, Clerk. By Harry L. Fouts, Deputy Clerk.

Mr. Connor: I would like to offer in evidence as Defendant's Exhibits 2 and 3 photographic reproductions of physical Exhibit G referred to in the depositions and which will be produced.

The Court: Is it stipulated that it is a true reproduction?

Mr. Owen: I was present when those were taken, so I know they are. [139]

The Court: Very well, if it is stipulated they can be received as Defendant's Exhibits 2-A and 2-B.

(The photographic reproductions were marked, respectively Defendant's Exhibits 2-A and 2-B.)

Mr. Connor: I offer in evidence a certified copy of the File Wrapper and Contents of the application on which the patent in suit issued as Defendant's Exhibit 3.

The Court: It will be so received as Defendant's Exhibit No. 3 in evidence.

(The document was marked "Defendant's Exhibit 3.")

Mr. Connor: I have three sets of patent copies to introduce, one set is the anticipating patents which we rely on, the other set is the prior art patents that we rely on, and the other set is the references which were cited during the prosecution of the application on which the patent in suit issued, which has been offered as Defendant's Exhibit 3. I have separated these patent copies and

placed them in folders for the Court's convenience. Would it be agreeable to the Court that each group be offered as Defendant's Exhibit 4, and then number the enclosed patent copies as A, B and C?

The Court: Are you offering them in volume form?

Mr. Connor: There are three separate sets for the court's convenience. There is a stipulation of record between counsel that uncertified patent copies may be used with the same force and effect.

The Court: What are you offering as Exhibit 4?

Mr. Connor: The anticipating patents group is offered as Defendant's Exhibit 4, and that group includes the patent to Hammill, No. 311,750, February 3, 1885; that will be Exhibit 4-A.

The Court: So ordered. [140]

(The patent was marked "Defendant's Exhibit 4-A.")

Mr. Connor: The patent to Aldrich, No. 340,691, April 27, 1886, as 4-B.

The Court: It will be so received.

(The patent was marked "Defendant's Exhibit 4-B.")

Mr. Connor: The patent to Savage No. 500,779, July 4, 1893, Exhibit 4-C.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 4-C.")

Mr. Connor: The patent to Harvey No. 534,473, February 19, 1895, as 4-D.

The Court: It will be so ordered.

(The patent was marked "Defendant's Exhibit 4-D.")

Mr. Connor: The patent to O'Toole, No. 878,014, February 4, 1908, as Exhibit 4-E.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 4-E.")

Mr. Connor: The patent to Meade, No. 1,428,294, September 5, 1922, as Exhibit 4-F.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 4-F.")

Mr. Connor: The patent to Welch, No. 1,927,105, September 19, 1933, as Exhibit 4-G.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 4-G.")

Mr. Connor: A group of prior patents as Defendant's Exhibit 5, which group includes the patent to Stevens, No. 311,149, January 20, 1885, as Defendant's Exhibit 5-A.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-A.")

Mr. Connor: The patent to Ober, No. 360,782, April 5, 1887, as Exhibit 5-B. [141]

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-B.")

Mr. Connor: The patent to Hentzell, No. 376,478, January 17, 1888, as Exhibit 5-C.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-C.")

Mr. Connor: The patent to Riley No. 403,700, May 21, 1889, as Exhibit 5-D.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-D.") [142]

Mr. Connor: Patent to Munsie No. 426,201, April 22, 1890, as Exhibit 5-E.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-E.")

Mr. Connor: Shearer No. 546,661, July 28, 1891, as Exhibit 5-F.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-F.")

Mr. Connor: Stephens No. 683,514, October 1, 1901, as Exhibit 5-G.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-G.")

Mr. Connor: Malley No. 1,209,315, December 19, 1916, as Exhibit 5-H.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-H.")

Mr. Connor: Spicer No. 1,363,440, December 28, 1920, as Exhibit 5-J.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-J.")

Mr. Connor: Muessman No. 1,519,694, December 16, 1924, as Exhibit 5-K.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 5-K.") [143]

Mr. Connor: The other group of patents constitute references cited during the prosecution of the Stadtfeld application on which the patent in suit issued, which is in evidence as Defendant's Exhibit 3. These will be offered as Defendant's Exhibit 6 and it includes patent to Bradbeer No. 390,438, October 2, 1888, as Exhibit 6-A.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 6-A.")

Mr. Connor: Patent to Lantzke No. 563,775, July 14, 1896, as Defendant's Exhibit B.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 6-B.")

Mr. Connor: Patent to Line No. 690,744, January 7, 1902, as Exhibit 6-C.

The Court: So ordered.

(The patent was marked "Defendant's Exhibit 6-C.")

Mr. Connor: Patent to Line No. 696,059, March 25, 1902, as Exhibit 6-D.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 6-D.")

Mr. Connor: Patent to Holden No. 732,299, June 30, 1903, as Exhibit 6-E.

The Court: So ordered. [144]

Mr. Connor: I will offer in evidence a certified copy of Section 2 of ordinance 37862 (N.S.) of the City of Los Angeles pertaining to gas water heaters, as Defendant's Exhibit 8.

The Court: If there is no objection it will be so received.

(The document was marked "Defendant's Exhibit 8.")

Mr. Connor: I also offer in evidence a certified copy of Section 82 and 85 $\frac{1}{2}$ , being extracts from original ordinance No. 49,567 (N.S.) of the City of Los Angeles, pertaining to gas water heaters and gas vents, approved August 28, 1924, as Exhibit 9. I might say that Exhibit 8 was approved January 28, 1918.

The Court: So ordered. [145]

JACOB A. STADTFELD,

called for the Defendant; sworn.

Mr. Connor: Q. Your full name, please?

A. Jacob A. Stadtfeld.

Q. And your residence address?

A. 5245 California Street, San Francisco.

Q. You are the claimed inventor of the patent in suit?

A. I am the inventor.

Q. You have been requested or directed in a subpoena duces tecum to appear this morning and to bring with you and produce all correspondence, that is original letters passing between yourself and the defendant Payne Furnace & Supply Co., Inc., or its representatives, pertaining to the invention and the development, manufacture, use or sale of vent pipes, and also pertaining or relating to your employment by the defendant Payne Furnace & Supply Company. Have you that correspondence with you?

A. I have not. I did not bring it because I had nothing to bring.

Q. That is, you have no letters of any kind, whatsoever, passing between yourself and Harry V. Payne, or Elroy Payne, or the Payne Furnace & Supply Co. during the years 1932, 1933 and 1934?

A. No, I have none in my possession.

Q. Have you any under your control?

A. No. I made a very thorough search quite a few weeks ago, as a matter of fact, for our own attorney, Mr. Owen.



(Testimony of Jacob A. Stadtfeld.)

Q. And your testimony is that all of these papers have been lost or destroyed?

A. That is true.

Mr. Connor: That is all.

Cross Examination

Mr. Owen: Q. Mr. Stadtfeld, did I request you to try and find everything that you had relating to any correspondence between the defendant Payne Furnace & Supply Company and yourself? [147]

A. You asked me for anything I had in my possession relating to my relations with the Payne Furnace & Supply Company.

Q. Or under your control?

A. Under my control.

Q. Were you able to find anything?

A. No, I was not.

Q. Who else assisted you in that search?

A. My wife.

Q. Was she able to find any correspondence?

A. No.

Q. Do you recall whether or not there was any correspondence or was your arrangement with Mr. Elroy L. Payne or the Payne Furnace & Supply Company covered by oral agreement, or do you have any definite recollection?

A. Well, it was by both. There were letters written, but I did not just take the trouble to keep them; I considered them of no value or no mo-

(Testimony of Jacob A. Stadtfeld.)

ment. Some of the arrangements were made orally.

Q. What is your practice with regard to keeping letters? Do you make any practice to keep copies of letters?

A. No, I quite evidently did not in this case. I have nothing in my—I won't say in my files—at home, in my drawers or wherever I might keep such things.

Q. Is it your habit to keep things of that sort in an orderly manner? A. No.

Q. Were you able to find any letters with respect to anything about your invention for me when I asked you to search?

A. I think the only thing that I did find was a copy of a letter that I wrote to Mr. Wright, of the Plant Rubber & Asbestos Works, that was attached to my old agreement with them. That is the only reason I think I kept it. I did keep the agreement.

Q. Who found that?

A. My wife found that. She usually has a habit of tucking things away that she believes may be of value.

Q. I understand she did not tuck away any of the letters that the defendant claims were written?

A. No. As a matter of fact, [148] I cannot recall that there was ever anything at that time that was of such value that I should keep it.

Mr. Owen: That is all. [149]

Afternoon Session.

Mr. Connor: This, your Honor, is the length of vent pipe, Exhibit G, which was introduced on the taking of depositions, and I suppose this will be introduced at this time as a part of the depositions.

The Court: You can turn it over to the Clerk.

Mr. Owen: If your Honor please, I would like to say I received from my correspondents in Washington a telegram in response to one I sent this morning, stating, "Disclaimer filed February 25, Certified copy was mailed yesterday." I assume that it will be here later today or tomorrow morning.

Mr. Connor: I stipulate with counsel that I will be agreeable to counsel putting it in at any time out of order.

The Court: I suppose he could proceed to offer it at this time if you do not object.

Mr. Owen: Then I offer as Plaintiff's Exhibit 1-A——

Mr. Connor: Pardon me, I intended to make objection to your offering it. I am not stipulating that it be offered.

The Court: Let us hear the offer before we hear the objection. What is the offer?

Mr. Owen: I offer an uncertified copy of the disclaimer filed in United States Letters Patent 2,013,193, I am advised, on February 25, with the request that the original certified copy from the

Patent Office be substituted for this exhibit when received by airmail probably tomorrow.

The Court: Any objection?

Mr. Connor: Yes, I object to the entry of the disclaimer in a case of this kind, your Honor, on the ground that it is not timely, that due diligence has not been shown in the making of the disclaimer, it comes too late; and further, that it is not a proper [152] disclaimer, and, on the contrary, is an attempt to enlarge upon and broaden and cause the claims in issue to cover a different invention; further on the ground that the disclaimer attempts to introduce in this case as a part of its claims which are to be construed by the Court subject-matter which does not of itself amount to invention, either standing alone or in combination with the other elements of the claims, and which disclaimer attempts to restrict the claims by adding or reading into the claims and in connection with the claims subject-matter which will constitute the claims mere aggregation as distinguished from patentable combinations.

The Court: What I understand from your objection is this, that you are not contending that there was not at least an attempt made to modify the invention by filing what you claim the disclaimer, that that document has not been received at Washington, but that it has, you think, no effect on the issues of this case.

Mr. Connor: That perhaps is a question of law.

The Court: In other words, you think it is irrelevant to the issues.

Mr. Connor: I think it is not proper according to law.

The Court: That would be a question of argument. It is a part of his case. Of course, it only has the value it is inherently entitled to, but do you desire to show if the Court does accept the view that it is of value that it has no value?

Mr. Connor: Yes.

The Court: It will be received as Plaintiff's Exhibit 1-A.

Mr. Connor: Exception.

(The document was marked "Plaintiff's Exhibit 1-A.")

Mr. Connor: I have here the correspondence I referred to before the noon adjournment, which at this time I would like to [153] offer as a group as Defendant's Exhibit A for identification.

The Court: How many letters are there?

Mr. Connor: There are 77 letters, including telegrams. There are 77 letters in Defendant's Exhibit A for identification.

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JACOB A. STADTFELD,

recalled for Defendant.

Mr. Connor: Q. Mr. Stadtfeld, I show you a letter dated April 13, 1932, written on the letterhead of Wayland Manufacturing Co., marked A-1 for

(Testimony of Jacob A. Stadtfeld.)

identification, and ask you to examine that and tell me whether or not that is your signature at the end, or your name, and if you wrote that subject-matter.

A. That is my signature, and I would say that I wrote that letter.

Mr. Connor: I will ask that that letter marked A-1 for identification be offered in evidence as Defendant's Exhibit 10-A.

The Court: Have you any objection?

Mr. Owen: I would like an opportunity to look through the letter. I have no objection to this particular letter.

The Court: It will be received as Defendant's Exhibit 10-A in evidence.

(The letter was marked "Defendant's Exhibit 10-A.")

Mr. Connor: Q. I show you another letter, Mr. Stadtfeld, dated April 19, 1932, written on the letterhead of the Wayland Manufacturing Company, and ask you to examine that and tell me whether or not that is your signature at the end, or your name, and whether or not you wrote that letter?

A. That is my signature and I wrote the letter.

Mr. Owen: No objection to that.

Mr. Connor: Counsel, I might ask if you have had some opportunity to look over the copies of these letters.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: No, I have not looked them all over.  
[154]

The Court: He is not objecting to this present offer, so it will be received as Defendant's Exhibit 10-B in evidence.

Mr. Connor: This would be 10-C. There is a letter in between.

The Court: You are offering A-3 as Defendant's Exhibit 10-C?

Mr. Connor: Yes.

(The letter was marked "Defendant's Exhibit 10-C.")

The Court: The only thing I am wondering about is whether or not the letters between may be admissible.

Mr. Owen: That may be very true.

Mr. Connor: I am perfectly willing to take it any way the court desires.

The Court: What date was that second letter?

Mr. Connor: The date of this letter was April 19, 1932.

The Court: What was the date of A-2?

Mr. Connor: That would be a copy which is dated April 16, 1932.

The Court: You give me that each time and I will fill it in.

Mr. Owen: In connection with my statement just made I had enough time during the noon hour to notice that these letters were not all here, and by

(Testimony of Jacob A. Stadtfeld.)

that I mean there would be one letter and we would jump over to the next letter and that would refer to a letter received in between by the parties, and that was left out by them. So I am going to make objection to any of these letters coming in where they have omitted to put in the whole correspondence, because these letters are all in their control. Mr. Stadtfeld has already testified that he has no copies, and therefore, it looks suspicious if they have so many of these letters and yet do not put them all in.

Mr. Connor: There are not so many of them, but we will explain that later, that they could not be found. We are doing the best we can. [155]

The Court: We will cross that bridge when we get to it. Proceed.

Mr. Connor: A-4 is dated April 22, 1932. I show you another letter Mr. Stadtfeld dated April 24, 1932, written on the stationery of the Wayland Manufacturing Company, and marked for identification as A-5. Do you identify that?

A. I identify that as my signature.

Q. You acknowledge having read that, that is your signature? A. Yes.

Mr. Connor: I ask that A-5 be introduced in evidence as Defendant's Exhibit 10-E.

Mr. Owen: I have no objection.

The Court: It will be received.

(The document was marked "Defendant's Exhibit 10-E.") [156]



(Testimony of Jacob A. Stadtfeld.)

Mr. Connor: I show you another letter dated May 12, 1932, also on the stationery of the Wayland Manufacturing Company, for identification A-10. Can you identify that?

A. Yes, I identify [157] that.

Mr. Connor: I ask that that be marked in evidence as Defendant's Exhibit 10-J.

The Court: So received.

(The document was marked "Defendant's Exhibit 10-J.") [158]

Mr. Connor: Q. I show you another letter dated May 18, 1932, on the stationery of the Wayland Manufacturing Company, and ask you if you can identify that.

A. I identify that. [159]

Mr. Connor: That is marked for identification A-12, and I ask that it be introduced in evidence as Defendant's Exhibit 10-L.

The Court: It will be so received. [160]

Mr. Connor: Q. There is an intervening letter dated June 9, 1932, A-19. Letter dated June 18, 1932, written in longhand.

A. I identify that.

Mr. Connor: The witness identifies the letter and we ask that it be marked "Defendant's Exhibit 10-R."

Mr. Owen: No objection.

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-R.")

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: If your Honor please, we are getting into letters that I have not had an opportunity to read.

The Court: Before they will be considered for reception he will have to display them to you.

Mr. Connor: Another letter dated July 11, 1932, can you identify that?

A. That is not on a letterhead.

Q. No, it is on paper.

A. Yes, I can identify that.

Mr. Connor: I ask that that be marked as "Defendant's Exhibit 10-T." [161]

Mr. Connor: Another letter written on plain paper dated December 6, 1932, for identification A-22, I will ask you if you can identify that letter?

A. Yes.

The Court: Speak up if you have any objection, Mr. Owen.

Mr. Owen: No objection.

The Court: It will be received as 10-V.

(The letter was marked "Defendant's Exhibit 10-V.") [162]

Mr. Connor: An intervening letter of December 20, 1932, A-25 for identification. An intervening letter of February 6, 1933, A-26 for identification. A letter written in longhand dated April 10, with no year given, but 1933 has been written in in pencil, and written in longhand. Do you identify the letter? Will you glance at it and see whether

(Testimony of Jacob A. Stadtfeld.)

or not that should have been dated the year 1933?

A. 1933 is correct, I will identify that.

Mr. Connor: This letter is marked A-27 for identification, and the witness identifies it, and I ask that it be marked Defendant's Exhibit 10-AA.

The Court: So ordered. [163]

(The letter was marked "Defendant's Exhibit 10-AA.")

Mr. Connor: An intervening letter dated May 8, 1933, for identification A-31. Another letter, Mr. Stadtfeld, written in longhand, dated May 12, 1932, and 1933 in pencil, and ask you if you can identify that as having been written on May 12, 1933 instead of 1932? A. Yes.

Mr. Owen: No objection.

Mr. Connor: I ask that it be marked Exhibit 10-AF.

The Court: It will be received.

(The letter was marked "Defendant's Exhibit 10-AF.")

Mr. Connor: Another letter written on cross section paper in pencil dated June 6, 1933, A-33 for identification. Can you identify that?

A. Yes.

Mr. Connor: I offer that as Defendant's Exhibit 10-AG.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-AG.")

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: No objection.

Mr. Connor: An intervening letter dated June 8, 1933, A-34 for identification. An intervening letter dated June 9, 1933, A-35 for identification.

Q. I show you a letter dated June 14, 1932 originally and changed to 1933.

A. It should be 1933.

Q. Would you say that letter was written in June, 1933?

A. '33 rather than 1932.

Mr. Connor: A-36 for identification, I ask that it be marked Defendant's Exhibit 10-AJ.

Mr. Owen: No objection.

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-AJ.") [164]

Mr. Connor: An intervening letter dated June 16, 1933, A-37 for identification.

Q. Another letter dated June 1933, A-38 for identification. Can you identify that?

A. Yes.

Mr. Owen: No objection.

Mr. Connor: I ask that that be marked "Defendant's Exhibit 10-AL."

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-AL.")

Mr. Connor: An intervening letter dated June 23, 1933, A-39 for identification.

(Testimony of Jacob A. Stadtfeld.)

Q. I show you a letter dated July 17th, 1933, written on the letterhead of Sheet Metal Works, A-40 for identification, and ask you if you can identify that. A. Yes.

Mr. Owen: No objection.

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-AN.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-AN.")

Mr. Connor: Q. I show you a drawing which accompanied the letter just referred to, and ask you if you recall forwarding that drawing.

A. Not with the letter. I do not recall forwarding the letter, but I do recall the drawing.

Q. Was it a drawing made by you?

A. No, it was not.

Q. It was made for you at your request?

A. Yes.

Q. Well, the drawing is termed "Construction of Duplex Metal Vent."

A. That is what I called it when I got it.

Q. The letter speaks of the manufacture and sale of what we term Duplex Metal Vent. Would you say that very likely that drawing was forwarded with that letter?

A. It may or may not have been. Since it is not referred to in this letter I would say that it was not forwarded. It was a drawing that was evidently given to [165] Mr. Payne at some other time.

(Testimony of Jacob A. Stadtfeld.)

Q. Will you glance through the letter and see whether there is any identification of it there?

A. There is no date on this drawing. I beg your pardon. In the first sentence on the second page it refers to the full details of construction.

Q. Then you would say the drawing was forwarded with the letter?      A. Yes.

Mr. Connor: That is A-41 for identification, and I ask that it be marked.

The Court: What is it?

Mr. Connor: That is a drawing.

The Court: Isn't that a part of the letter?

Mr. Connor: But unfortunately I have given it a separate number and I am afraid I will get all mixed up. It is referred to in the letter.

The Court: It will be received as Exhibit 10-AO.

Mr. Owen: No objection.

(The letter was marked "Defendant's Exhibit 10-AO.")

Mr. Connor: An intervening letter dated September 21, 1933, A-42 for identification.

Q. I show you a letter dated September 26, 1933, written on the stationery of the Standard Asbestos Company, A-43 for identification, and ask you if you can identify that?

A. Yes.

Mr. Owen: No objection.

Mr. Connor: I ask that it be marked 10-AQ.

The Court: So ordered.

(Testimony of Jacob A. Stadtfeld.)

(The letter was marked "Defendant's Exhibit 10-AQ.")

Mr. Connor: An intervening letter dated November 3, 1933, A-44 for identification.

Q. A letter dated October 14, 1933, on the letterhead of the [166] Standard Asbestos Company, A-45 for identification. Can you identify that?

A. Yes.

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-AS.

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-AS.")

Mr. Connor: Q. I show you another letter dated November 6, 1933, written on the letterhead of the Standard Asbestos Company, A-46 for identification. Can you identify that?

A. Yes.

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-AT.

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-AT.")

Mr. Connor: Q. I show you another letter dated December 8, 1933, on the letterhead of the Standard Asbestos Company, A-47 for identification. Can you identify that? A. Yes.

Mr. Connor: The witness identifies it, and I ask that it be marked Defendant's Exhibit 10-AU.

(Testimony of Jacob A. Stadtfeld.)

The Court: It will be so received.

(The letter was marked "Defendant's Exhibit 10-U.")

Mr. Connor: An intervening letter dated February 22, 1934, A-48 for identification; a letter dated February 28, 1934 also on the letterhead of the Standard Asbestos Company, A-49 for identification. Can you identify that? A. Yes.

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-AW.

The Court: It will be so received.

Mr. Owen: No objection.

(The letter was marked "Defendant's Exhibit 10-AW.") [167]

Mr. Connor: An intervening letter dated March 24, 1934, A-56, for identification. A communication dated March 26, 1934 also written on the form of Payne Furnace & Supply Company, inter-departmental correspondence only, A-57 for identification, and ask you if you identify that.

A. Yes. [168]

Mr. Connor: I ask that that be marked "Defendant's Exhibit 10-BE.

The Court: So ordered.

(The letter was marked "Defendant's Exhibit 10-BE.")

Mr. Connor: A similar communication dated March 27, 1934, A-59 for identification. Can you identify that? A. Yes.



(Testimony of Jacob A. Stadtfeld.)

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-BG.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-BG.") [169]

Mr. Connor: Q. I show you a communication dated April 9, 1934, on the Departmental Correspondence Form of the Payne Furnace & Supply Company, A-66 for identification, and ask you if you can identify it. A. I identify it.

Q. Would you say that the copy of the letter referred to in A-66 is the copy which is marked A-66 for identification that was forwarded with that letter? A. Yes, I identify it.

Mr. Connor: I ask that these two be marked Defendant's Exhibit 10-BN. The witness has identified it as having been transmitted with the Exhibit 10-BN.

The Court: It is part of the letter. It does not require any other number. All that has to be done is to attach them together.

Mr. Connor: They are stapled together.

The Court: That is all right if they are stapled together.

(The documents were marked "Defendant's Exhibit 10-BN.") [170]

Letter of Mr. Stadtfeld dated September 6, 1934, A-75 for identification. Can you identify that? That is right.

Mr. Owen: No objection.

Mr. Connor: I ask that that be marked Defendant's Exhibit 10-BW.

The Court: So ordered.

(The letter was marked "Defendant's Exhibit 10-BW.") [171]

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HARRY V. PAYNE,

called for the Defendant; sworn.

Mr. Connor: Q. Where do you reside, Mr. Payne?

A. 3834 Third Avenue, Los Angeles.

Q. What is your business?

A. Manufacturer's representative.

Q. For what company?

A. Several companies. Spencer Thermostat Company for one. Milwaukee Gas Specialties. Monmouth Products Co. Furbelow Blower Co.

Q. Are you related to Mr. Elroy L. Payne?

A. My brother.

Q. Have you ever been in the employ of the Payne Furnace & Supply Company? A. Yes.

Q. During what period of time?

A. Well, the last period was from [172] 1925 to 1935.

Q. From 1925 to 1935?

A. That is right.

Q. What was your position or positions with the company during that period of time?

(Testimony of Harry V. Payne.)

A. Well, the most of that time I was Northern California representative, residing in San Francisco. The latter two years, however, I was in Los Angeles as General Sales Manager.

Q. During what period of time would you say you were in Los Angeles, what years, about what time?

A. I came down there the very early part of January, 1935. My connections were severed April 1, 1935.

Q. As General Sales Manager what were your duties?

A. Well, handling the wholesale salesmen on the road, and general sales of the entire line of products as manufactured by the Payne Furnace & Supply Company.

Q. Were you acquainted with Mr. Jacob A. Stadtfeld, the patentee of the patent involved in this suit?      A. Yes.

Q. How long have you known Mr. Stadtfeld?

A. Well, approximately either in 1924 or 1925 —not later than 1925; maybe as early as 1924.

Q. When did you first learn of his having any interest in vent pipes?

A. I have to reckon back a little on that. It was prior, just prior to the time that I assumed the management of the Oakland Branch, which was in the spring of 1927, just prior to that time, as to how long I would not say, but just prior to that.

(Testimony of Harry V. Payne.)

Q. Do you recall whether Mr. Stadtfeld was ever in the employ of the Payne Furnace & Supply Company?      A. Yes.

Q. When, during what period of time?

A. Well, from around the spring of 1934 until the latter part, in the fall of 1934, as I recall it. I have no definite records. Then there was another [173] short period prior to that time that he was, for about six weeks, I would say—I don't recall just what year it was, but it was prior to that time. I do not have those records with me. I would not know exact dates.

Q. I am not asking for exact dates, just generally what you recall.

A. That is as I recall it.

Q. What were his duties with the company during this period of time?

A. Well, the general manufacture and promotion of sales of what was termed Metalbestos at that time while he was in Beverly Hills, the overseeing of the manufacture and sales promotion.

Q. You say you were very well acquainted with Mr. Stadtfeld? Were you more or less associated with him during the time of his employment with the Payne Furnace & Supply Company?

A. Quite well, yes.

Q. By the way, his employment was in Los Angeles, was it not?

A. In Beverly Hills.

(Testimony of Harry V. Payne.)

Q. Can you recall when Mr. Stadtfeld left the employ of the Payne Furnace & Supply Company?

A. Well, I would not know the exact date; it was, I should judge, in the fall of 1934, however, right around there.

Q. Did you have anything to do with the work that he was handling for the company?

A. Well, yes, as general sales manager, naturally, his endeavors came under my supervision.

Q. Do you know whether, that is, through any conversation with Mr. Stadtfeld, or anything he said to you, whether he left the employ of the Payne Furnace & Supply Company of his own volition?

A. Well, I assume of his own volition.

Mr. Owen: I move that the answer be stricken; it is only based on an assumption, he has no knowledge.

The Court: That is true. You have to answer only what you know. You don't know, as a matter of fact, as to whether he was [174] discharged or whether he left?

A. I definitely know that he left of his own volition, if that is what you mean.

Q. You know that?

A. Yes. I did not get the question.

Mr. Connor: Q. That is, you know he was not discharged, do you? A. Definitely.

Q. Did he give any particular warning of the severance of his connection with the company?

(Testimony of Harry V. Payne.)

A. Not to me.

Q. How suddenly did it come about?

A. I would assume within fifteen minutes, somewhere in that neighborhood.

Q. What did he say to you concerning his discontinuance of his connection with the company?

A. Well, he just said that he was quitting, that was all, that he received a letter that he had been waiting for and that he was through. That was all there was to it.

Q. Do you know through contact with Mr. Stadtfeld and through association with him whether or not he had any complaint to make regarding his employment during the entire period of time he was with the company?

A. He never complained to me.

Q. Were you more or less closely associated with him?

A. Yes, I was, as I say I had supervision of his endeavors.

Q. In any social way at all?

A. We used to gather together once in a while in the evening, if that is what you mean.

The Court: I think now is a good time to adjourn. Bear in mind that tomorrow morning eleven o'clock is when we will resume this particular case.

(An adjournment was here taken until tomorrow, Wednesday, March 2, 1938, at eleven o'clock a.m.)

(Testimony of Harry V. Payne.)

Wednesday, March 2, 1938.

HARRY V. PAYNE,

Direct Examination

resumed.

Mr. Connor: Q. During the period of your employment by the defendant Payne Furnace & Supply Company at Beverly Hills, did you have any correspondence with Mr. Stadtfeld?

A. Yes.

Q. Regarding what?

A. Well, regarding vent pipe, metalbestos, etc.

Q. And during the period of time that you were the San Francisco representative of the defendant, did you carry on correspondence with the company at Beverly Hills?

A. Some, I believe, just prior to the time I went down there.

Q. Prior to the time you went to Beverly Hills?

A. Yes.

Q. I show you a communication dated June 6, 1932, written on the interdepartmental correspondence form of the Payne Furnace & Supply Company, from H. V. Payne to E. L. Payne. Can you identify that letter?

A. Yes, that is my signature.

Q. You wrote that letter? A. Yes.

Mr. Connor: That is A-15 for identification, which I think will make it 10-O.

(Testimony of Harry V. Payne.)

The Court: A-15, 10-O. You offer it in evidence?

Mr. Connor: Yes.

Mr. Owen: No objection.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-O.")

Mr. Connor: Q. I show you a copy of a letter dated February 6, 1933, addressed to Mr. J. Alvin *Stedtfeld*, care of Payne Furnace & Supply Co., 557 Market Street, San Francisco, California, initialed at the bottom "H.V.P." That is A-26 for identification. Can you identify that letter as having been written by you?

A. Yes, I dictated that letter. [180]

Mr. Connor: That, according to my notation, your Honor, would be 10-Z.

The Court: Correct.

Mr. Connor: I offer it.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-Z.")

Mr. Connor: Q. I show you a communication dated February 22, 1934, written on the interdepartmental correspondence form of Payne Furnace & Supply Company, from H. V. Payne to Don D. Fleming and Stanley P. Ackerman, San Francisco, A-48 for identification. Can you identify that com-



(Testimony of Harry V. Payne.)

munication as having been dictated and written by you?      A. That is my signature.

Q. You dictated the letter?

A. Yes, I dictated the letter.

Mr. Connor: That, I believe, your Honor, will be Defendant's Exhibit 10-AV.

The Court: That is correct. So received.

(The letter was marked "Defendant's Exhibit 10-AV.")

Mr. Connor: Q. I show you a copy of a letter dated March 2, 1934, addressed to Mr. J. A. Stadtfeld, care Payne Furnace & Supply Co., 1063 Howard Street, San Francisco, California, by Payne Furnace & Supply Co., by (blank), initialed H. V. P.—that is A-50 for identification—can you identify that letter?      A. I identify the letter.

Q. When I ask you if you can identify it, I mean did you dictate the letter and sign it and forward it to the person to whom it was addressed?

A. Yes.

Mr. Connor: That will be Defendant's Exhibit 10-AX.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-AX.")

Mr. Connor: I show you another copy of letter dated March 13, [181] 1934, addressed to Mr. J. A. Stadtfeld, care Payne Furnace & Supply Company, 1063 Howard Street, San Francisco, Calif., signed

(Testimony of Harry V. Payne.)

Payne Furnace & Supply Co. by (blank) and initialed H.V.P., A-51 for identification. Can you identify that letter or the copy?

A. Yes, I dictated that letter and signed it.

Q. My request for identification also means this was a copy of an original which you signed and mailed to the person to whom it is addressed?

A. Yes.

Mr. Connor: This will be Defendant's Exhibit 10-AY.

The Court: That is correct. It will be so received.

(The letter was marked "Defendant's Exhibit 10-AY.")

Mr. Connor: Q. I show you a copy of a letter dated March 15, 1934, addressed to Mr. J. A. *Satd*-feld, care Payne Furnace & Supply Co., 1063 Howard Street, San Francisco, signed Payne Furnace & Supply Co., by (blank), initialed H.V.P.—that is A-52 for identification.

A. I dictated that letter.

Mr. Connor: That will be Defendant's Exhibit 10-AZ.

The Court: Q. That is a letter you wrote and dictated: is that right?

A. Yes, I dictated it and signed it.

Q. It is a copy of a letter you dictated and signed and forwarded? A. Yes.

(Testimony of Harry V. Payne.)

Q. That is true of all of these that have been referred to?      A. Yes.

(The letter was marked "Defendant's Exhibit 10-AZ.")

Mr. Owen: As I understand the identification means also the verification of the contents of the letter?

Mr. Connor: Yes, that he dictated and signed and verifies the contents of the letter.

Q. I show you a copy of a letter dated March 24, 1934, that is, a copy of a letter, apparently, written upon the interdepartmental correspondence form, from H. V. Payne, Beverly Hills, to A. J. Stadtfeld, 1063 Howard Street, San Francisco, Calif., regarding [182] Metalbestos vent pipe, signed (blank) and initialed H.V.P.—this is A-56 for identification—read that over and state whether or not you dictated and signed the original?

A. I wrote that letter, myself, as indicated by the last paragraph, being Saturday afternoon.

Q. You wrote it on a typewriter, yourself, the original?

A. Yes, I wrote it and signed it and mailed it, myself.

Mr. Connor: That will be Defendant's Exhibit 10-BD.

The Court: Yes. So received.

(The letter was marked "Defendant's Exhibit 10-BD.")

(Testimony of Harry V. Payne.)

Mr. Connor: I show you an interdepartmental communication dated April 2, 1934, from H. V. Payne to San Francisco Branch, A-62 for identification. Can you identify that? A. Yes.

Mr. Connor: This is Defendant's Exhibit 10-BJ.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-BJ.") [183]

Mr. Connor: Q. A copy of a letter dated September 7, 1934, to Mr. J. A. Stadtfeld, 644 17th Avenue, San Francisco, Calif., and signed Payne Furnace & Supply Co. (blank), but not initialed, A-76 for identification. Can you identify that letter?

A. I dictated that letter.

Mr. Owen: Just a minute, your Honor.

Mr. Connor: It says on the bottom "P.S. I will be leaving Sunday night for Texas." Does that mean anything?

A. It says "As I will be leaving Sunday night for Texas." That is because [184] I was leaving right away.

Mr. Connor: That will be Defendant's Exhibit 10-BX.

The Court: Correct. So received.

(The letter was marked "Defendant's Exhibit 10-BX.")

Mr. Connor: Q. Mr. Payne, I will hand you the batch of these letters that you have identified. Here is a list of them. Will you state the circum-

(Testimony of Harry V. Payne.)

stances as you know them under which these letters were written? You have read through them so far now; just state the circumstances under which these various letters were written.

Mr. Owen: Might we have the witness call attention first to the letter he is reading, so that we can get it out of our stack, giving the exhibit number and date?

The Court: What is the exhibit number?

Mr. Connor: I will call the exhibit number. The first one is June 6, 1932, Exhibit 10-O. Here is a list of the dates. If you have not read them all fully just go through them and then give us your understanding of the circumstances.

A. Well, this letter was a letter to my brother as to the progress—you see, I was in San Francisco at the time—the progress that Mr. Stadtfeld was making with the Wayland Company for making of wrapped asbestos or laminated asbestos.

Q. Was Mr. Stadtfeld at that time carrying on any negotiations with your or your company regarding the selling of vent pipe?

A. Yes, I think they had been in correspondence before that and conversations.

Q. Is that what that letter pertains to, Exhibit 10-O?      A. Yes.

Q. Was that vent pipe that is now known as Metalbestos?      A. No.

Q. Was that before you had ever heard of the pipe known as Metalbestos?      A. Yes.

(Testimony of Harry V. Payne.)

Q. Turn to the letter of February 6, 1933, Defendant's Exhibit 10-Z. [185]

A. Well, this letter was written right after a serious agitation down there against another vent pipe.

Q. What vent pipe?

A. It speaks of it here, Vitex. There had been some experiments prior to this time on another pipe that was at least temporarily called Allumicell. I wrote him we were considering it, as the letter indicates.

Q. What was the Allumicell?

A. That was an aluminum pipe with a wrapping on the outside, air-cell wrapping, and then in one or two instances we wrapped it with canvas covering.

Q. Was Mr. Stadtfeld at that time in any way connected with the manufacture or sale of this so-called Vitex?

A. At that time I do not think so.

Q. Vitex was another form of vent pipe that was being used in Southern California?

A. It had been.

Q. Was that anything like what is now known as Metalbestos?      A. No.

Q. Was "Allumicell anything like what is now known as Metalbestos?

A. Well, to the extent that it was aluminum pipe, two layers of corrugated paper on the out-

(Testimony of Harry V. Payne.)

side, and metalbestos has another metal casing on the outside in addition.

Q. Now, regarding this Defendant's Exhibit 10-AV, of February 22, 1934, will you state the circumstances surrounding the writing of that letter?

The Court: Isn't that duplicating what he gave this morning when it was received?

Mr. Connor: This is the circumstances surrounding the writing of the letter.

A. I apparently wrote the San Francisco office telling them——

The Court: Do not say "Apparently," as that creates a doubt as to whether you did or not. Say what you said or what you recall.

A. I wrote the San Francisco office advising that [186] Stadtfeld was coming up there to wind up——

The Court: I suggest to counsel if there is anything that the witness remembers about the circumstances of writing the letter they give it, but when the witness just repeats what the letter says, the letter speaks for itself.

Mr. Connor: That is not what I want.

The Court: Ask him the question which will produce new material. I do not want him to simply read the letter. I can read the letter and interpret it, myself.

(Testimony of Harry V. Payne.)

Mr. Connor: All I want to know if, you refer to Mr. Stadtfeld, and was that during the period of time that he was in the employ of the company in Beverly Hills, or prior to that time?

A. Well, that was prior to that time.

Q. Had Mr. Stadtfeld been down to the plant in Beverly Hills at the time or just prior to the time of the writing of this letter? A. Yes.

Q. Did you talk with him at that time, prior to the writing of this letter, regarding any employment by the defendant?

A. Well, at that time I was not in a position to talk to him about employment.

Q. Referring to Defendant's Exhibit 10-AX, you refer to a Mr. Dutton there. Who is Mr. Dutton?

A. Well, Mr. Dutton was the owner of the other asbestos company, it was called——

Q. The Standard Asbestos Company?

A. Standard Asbestos Company. It slipped my mind for the moment. We used to speak of Mr. Dutton when we had in mind the Standard Asbestos Company.

Q. Now, I may be mistaken, Mr. Payne, but did you have any discussions with Mr. Stadtfeld at Beverly Hills, California, regarding his later employment by the defendant?

A. At which time do you mean?

Q. Prior to the writing of this letter of March 2, 1934; if you [187] did not, say so. I may be wrong. I thought you had.



(Testimony of Harry V. Payne.)

A. No, I had not had any—it was on or about this time.

Q. Well, now, you speak in this letter of Mr. Dutton, taking certain materials off his hands. What is the meaning of that, what did that relate to?

A. Well, you see, without re-reading these I do not recognize exactly the dates, I don't know exactly the dates when Mr. Stadtfeld started.

Q. Do you remember the circumstances under which the letter was written to Mr. Dutton and what were the materials and what were they for?

A. Mr. Stadtfeld came down to Los Angeles, or wrote, one or the other, I do not recall just exactly which, and he said that Mr. Dutton—

Mr. Owen: I object to what he said unless he said it to this witness.

Mr. Connor: Q. Did he say it to you? Tell what he told you, what Mr. Stadtfeld said to you.

A. Well, he said—

Mr. Owen: Q. Were you present at the conversation about which you are testifying?

The Court: He is asked what he said to him. He has to be present when he said it to him.

A. He said, as I recall, that if the Payne Furnace Company would relieve Mr. Dutton of the Metalbestos Pipe and unfinished portions of at that time that he had in stock, that he, Mr. Dutton, would allow the Payne Furnace Company to use the name Metalbestos, if desired, to proceed with

(Testimony of Harry V. Payne.)

the manufacture of it, and it would greatly relieve them of any further hand in the manufacture of the product.

Mr. Connor: Q. I am asking of your own knowledge, what you said to Mr. Stadtfeld and what he said to you, not what you heard about what he said, but if he did say anything to you—was anything [188] said by you to Mr. Stadtfeld regarding his negotiations with Mr. Dutton to take over this stock of materials on hand?

A. Well, he was sent up to San Francisco to negotiate and relieve Mr. Dutton of that stock.

Q. After he had been in Beverly Hills, just shortly prior to the writing of this letter?

A. Yes.

Q. This letter, as I understand it, relates to the purchase of Mr. Dutton's stock?

A. That is correct.

Q. Referring now to Defendant's Exhibit 10-BD, which you say you wrote, yourself, read that over and state the circumstances—it is not necessary to repeat what was written there, but state the circumstances under which the letter was written and why the letter was written.

A. Well, this letter was written after I had had a talk with my brother, E. L. Payne and after a former conversation with Mr. Stadtfeld, wherein we agreed on his salary per month, and I wrote this letter to indicate when his employment would start,

(Testimony of Harry V. Payne.)

and also the definite authority for him to proceed to buy the stock of Mr. Dutton, and to purchase some component parts from the Williams Wallace Company to make complete fittings; in other words, he was some parts short.

Q. Did Mr. Stadtfeld enter the defendant's employ shortly after the writing of that letter?

A. Yes.

Mr. Connor: That is all.

The Court: We will be in recess now until two p. m.

(A recess was here taken until two o'clock p.m.)

[189]

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Afternoon Session

HARRY V. PAYNE,

Direct Examination

resumed.

Mr. Connor: If your Honor please, I would like to ask one or two more questions of the witness on direct.

The Court: Proceed.

Mr. Connor: Q. Mr. Payne, these letters that you have referred to and identified as having been received by you, under whose direction were those letters written?

A. General Manager E. L. Payne.

Q. Were they or were they not the result of conferences you had with him?

(Testimony of Harry V. Payne.)

A. They were.

Q. And you wrote them as his assistant, did you not?      A. That is right.

Mr. Connor: That is all.

#### Cross Examination

Mr. Owen: If your Honor please, I have now received the certified copy of the disclaimer, and wish to file it. It has already been exhibit number 1-A, and will be substituted for an uncertified copy which has heretofore been marked.

The Court: Such will be the order .

Mr. Owen: Q. Mr. Payne, you and Mr. Stadtfeld knew each other rather well, didn't you, at the time he was working for your company in Los Angeles?      A. Yes.

Q. I believe you played pinochle two or three times a week, is that right?

A. Several times a week, I would say, yes.

Q. First at his house and then at your house?

A. Mostly at my house; however, sometimes the other way.

Q. And was it not more or less customary with both of you at that time on those social evenings not to discuss business?

A. Seldom, if ever; I doubt whether we discussed it at all. [190]

Q. Your discussions with him of business matters were usually at the office, weren't they?

(Testimony of Harry V. Payne.)

A. Yes.

Q. You were his boss?

A. That is right. I would say his supervisor. I would not say a boss.

Q. He worked directly under you: is that right?

A. Yes.

Q. Do you remember what you did on Saturday, September 1, when Mr. Stadtfeld left the employ of the Payne Company?

A. Well, I would not know definitely, I do not think.

Q. When he left he went back to the hotel, Beverly Vista—that is where he was living, was it not?

A. He was living there.

Q. You went over there while he was packing up and spent about an hour with him, didn't you?

A. It was in the evening or late afternoon, after office hours.

Q. He went through his papers and gave you whatever papers there were there that related to the Payne business, didn't he?

A. No, there were no papers exchanged at that time or given me.

Q. Were they given you at an earlier time?

A. No.

Q. Then during that hour's visit most of the time was spent in discussing Stadtfeld's relations with the Payne Company, was it not?

A. No, most of that hour was consumed in negotiating the sale of a typewriter that he did not

(Testimony of Harry V. Payne.)

want to carry with him to San Francisco, and bargaining on that, and paying for same, and taking it out of his possession.

Q. But it is true, is it not, that at that visit, when you were at his hotel room, you did discuss the matter of his having had what he called a raw deal from the Payne Company: That is true, is it not?      A. Very slightly.

Q. But it was discussed, was it not?

A. Just in a very few words.

Q. Your attitude at that time was more or less sympathetic with him, was it not?

A. I would not say it was. [191]

Q. But you would not say it was not?

A. No, I censured him at that time. I thought he was hasty in leaving the employ without giving the company a chance—in a friendly way I censured him for not continuing on for sometime, to wait and see how the thing came out.

Q. Then by waiting to see the thing came out the idea was that he was to have a new deal, was it not, that is, the company had never gone through with the deal they had indicated they would give him when he went down there?

A. I think they had, yes.

Q. You do not deny that during the time he was there he complained to you many times that ElRoy Payne was not living up to his agreement, did he not?

(Testimony of Harry V. Payne.)

A. He complained that way but I did not agree with him.

Q. That complaint was that he had representations that he would have a certain deal and he had gotten down there and then Mr. El Roy Payne, your brother, would not go through with it. That was his complaint, was it not?

A. Well, to my knowledge he had gone through with it up to that point, definitely.

Q. Yet you just said that you advised him to wait and give your brother more of a chance?

A. The original understanding was that he was to wait until Metalbestos got to such a salable extent that it would really make a revenue for the company, and then other steps were to be taken to raise his compensation.

Q. On the basis of performance of Metalbestos?

A. On the basis of revenue, of profit after manufacture.

Q. It was to be in the nature of a royalty for what he had turned in to the company? [192]

Mr. Owen: There is a letter here of March 24, written by this witness to Mr. Stadtfeld, and that is Exhibit 10-BD——

Mr. Connor: There is absolutely nothing mentioned in this letter regarding his contract or a contract for the payment of royalties, at all. The witness wrote him and said, "Your employment will

(Testimony of Harry V. Payne.)

start as per our discussion at \$150 a month." Now, there is no letter or any kind of a definite contract other than he is going to work at \$150 a month.

The Court: Was there any definite contract?

A. No, that letter was written after conference that morning with my brother as his agent. I had no authority. [194]

Q. You simply dictated the terms without having participated in it?

A. Yes, I had no authority to hire anybody or let anybody go. That was beyond my authority.

The Court: I will sustain the objection.

Mr. Owen: If your Honor please, this morning you pointed out that in these letters we would only go into matters which were ambiguous. Now, then, we maintain that that letter of March 24, 1934 is ambiguous.

The Court: He said he had nothing to do with it, he knows nothing about it. He testified all he did was to write down all his brother said to write down. Isn't that correct? A. Yes.

Q. You simply wrote down what was told you?

A. That letter was written, as I recall, Saturday afternoon. I wrote it on the typewriter, myself, after a conference with my brother in the morning, in order to get it into Mr. Stadtfeld's hands Monday.

Q. Your brother did all of the negotiating?



(Testimony of Harry V. Payne.)

A. My brother set salaries, and he was general manager.

Q. He negotiated this agreement that you wrote about?      A. Yes.

Mr. Owen: Q. You were present?

A. I was present at some of the conversation.

Q. You testified this morning to the terms of that contract, didn't you?

A. That letter is evidence of that.

Q. Answer my question. You testified this morning as to the terms of that contract?

The Court: What it consisted of?

A. Yes, the terms as outlined in the letter.

Mr. Owen: Let me get this straight. You testified this morning you were present when Mr. Stadtfeld was there and was told the terms at which he could come down to Los Angeles.

Mr. Connor: I object to that, that is misquoting the record. [195]

Mr. Owen: Let us have the record read of what he said.

The Court: Q. Did you say anything like that?

A. Not that I recall.

Q. Anyway, it was not true if you did say it: is that right?      A. That is right.

The Court: Let us proceed.

Mr. Owen: Q. My note shows this morning you testified that Stadtfeld came to Los Angeles and said that if the Payne Furnace & Supply Company

(Testimony of Harry V. Payne.)

would relieve Dutton of Metalbestos pipe and the unfinished parts he had in stock that Dutton would allow Payne to use the name Metalbestos if they desired to proceed with the manufacture. Did you testify that way this morning?

A. That is right.

Q. You were present at that conversation, weren't you?

A. At that particular conversation, yes.

Q. That was discussing the terms under which Stadtfeld was coming down there, was it not?

A. That was only pertaining to the relief of Dutton of the Metalbestos.

Q. All right. What was said in that conversation about the patent application on the invention, the right to use the invention?

A. I do not recall that.

Mr. Connor: I object to that. I think that is improper cross-examination.

Mr. Owen: I do not think it is improper.

Mr. Connor: This witness has not testified to having any knowledge.

The Court: Q. Do you know what was said about it, if anything?

A. I do not recall that anything was mentioned about it at this time, at all, as I recall it.

Mr. Owen: Q. Mr. Stadtfeld represented to you that he had [196] an invention there, didn't he, at that conversation?

(Testimony of Harry V. Payne.)

A. I don't recall that he did.

Q. Why was it you were bothering about dealing with Dutton if there were not some inventions and there were not some rights outstanding in somebody else?

A. Because Mr. Stadtfeld had explained to us down in Los Angeles that Mr. Dutton could not proceed with the manufacture of that particular vent pipe, it was too costly for him, and that he wanted a position where his position would be steady, and if these component parts were relieved at Mr. Dutton's place of business that Mr. Dutton was willing to retire from the Metalbestos manufacture and turn the manufacture over to the Payne Furnace Company.

Q. And Stadtfeld explained to you at that time, didn't he, that he had assigned all of his rights to Dutton?      A. No.

Q. When did he explain it to you?

A. He never did explain anything of the kind.

Q. Never at any time that you were present did you know that Dutton owned all of the rights in this Metalbestos by assignment from Stadtfeld?

A. No.

Q. Why was it then that your company set about to relieve Mr. Dutton of all of his stock? Your company, as your own letters show, was not in business for health. [197]

Mr. Owen: Q. Did your company make efforts to dispose of Dutton's stock?

(Testimony of Harry V. Payne.)

A. The Metalbestos component parts they made direct purchase of.

Q. They made direct purchase of the complete stock?      A. Some.

Q. But they did not take all of the stock, did they?

A. It was not the understanding that they were to.

Q. You mean that you know about, that was not the understanding?

A. As far as I know, yes.

Q. You said this morning that Mr. Stadtfeld was sent back to San Francisco following the conversation on February 22, 1934 to negotiate with Dutton. What did you mean by that?

A. Well, the relief of those component parts of his stock, component parts of Metalbestos, and to get some to Los Angeles so that it could be assembled.

Q. And he was to dispose of part of it through your San Francisco Branch, was he not?

A. As I recall it he was.

Q. Was there any definite deal that you know of between the Payne Company and Stadtfeld up to the time that he was sent up to San Francisco on February 22, 1934?

A. February 22—might I ask if that is the same time you refer to?

Q. Yes.

A. Now will you state the question again?

(Testimony of Harry V. Payne.)

Mr. Owen: May I have the reporter read it?

The Court: Read the question.

(Question repeated by the reporter.)

A. I think not.

Mr. Owen: Q. Was there any definite deal with Dutton up to that time to take the stock of Metalbestos?

A. I do not recall that. I would probably have to refer to that correspondence. I would not know the exact date on which that [198] transpired.

Q. Was a deal subsequently made with Dutton to take his stock?

A. I think that is evidenced by correspondence.

Q. There was, you say?

A. By correspondence, I believe it was.

Q. To take all of his stock?

A. Well, certain complete stock that he had.

Q. Will you refer to the letter that shows you were not to take his complete stock?

A. I would not be able to refer to it without seeing the file on it.

Q. The file is here.

A. I don't know whether that was very definitely written; as far as that is concerned, I would not say.

The Court: Q. You do not recall any letter?

A. There were letters there as to certain items that we were to take.

Mr. Connor: I think, Counsel, you are referring to this letter.

(Testimony of Harry V. Payne.)

Mr. Owen: He is the one that knows the letter. I don't know the letter. He said there is a letter here which shows that, as I understand him, they were to take only portions of Mr. Dutton's stock. I want him to point out those letters.

Mr. Connor: I think it is only fair to the witness——

Mr. Owens: I don't know what letters they are.

Mr. Connor: I don't want to interfere with your examination but I think you might ask him if that is the letter.

Mr. Owen: All right.

Q. That is your own counsel's suggestion that that is the letter. I want you to find the letter that you have in mind.

Mr. Connor: I did not say it was.

Mr. Owen: Q. Let me read to you from your letter of March 13, 1934, Exhibit 10-AY, to Mr. Stadtfeld. This is in the interim period between the time he came back to San Francisco and before he returned to Los Angeles in April of 1934, the fourth [199] paragraph of this letter: "No doubt this situation will break with a bang so that all that can be done in that territory"— You are referring to the San Francisco territory, aren't you?

A. I would imagine so, yes.

Q. "to promote for the future and dispose of Dutton's stock will facilitate our entering this proposition more wholeheartedly than if we were to market it."

(Testimony of Harry V. Payne.)

Does that mean the whole of the stock or just part of it?

A. No, that referred to the Metalbestos that Mr. Dutton had completed and which at one time was either represented or mentioned that he would have no trouble of disposing of through the Pittsburgh Water Heater Company, who had been a customer of his prior to that time. That is what that had reference to. In other words, so that we would not have competition in the field, he was to help Mr. Dutton dispose of the complete stock.

Q. That was in line with Payne taking over all of Dutton's Metalbestos, was it not?

A. It was in line with Payne taking over all uncompleted and component parts. That was always my understanding.

Q. You identified this morning a letter, Exhibit 10-BD, in that file that you have there. Do you know where the other letters are that are referred to in that letter, and why they were not produced in evidence?

A. You are referring to the letter of March 7, 1934, I assume?

Q. Yes.

A. I would not know why they are not here. That was evidently addressed to the Payne Furnace & Supply Company, so I would not know really where they are.

Q. All of these letters, so far as you know, were supposed to show all of the correspondence that

(Testimony of Harry V. Payne.)

passed between Mr. Stadtfeld and the Payne Furnace & Supply Company?

A. As far as I would know. [200]

Q. Before any of these letters were produced you were in the court-room when Mr. Stadtfeld was put on the stand and shown not to have any copies, weren't you?

A. I think so, yes.

Mr. Connor: The record so shows.

The Court: Let us proceed.

Mr. Owen: Q. The allumicell to which you referred this morning in connection with Exhibit 10-Z, the first samples of that were sent down from San Francisco, weren't they?

A. Little, short samples.

Q. And then others were made up down there?

A. Yes.

Q. I show you Exhibit 10-BB, a letter from Stadtfeld to yourself, and in the next to the last line of the last paragraph it says: "The waiting is very embarrassing and certainly would appreciate an early decision." That embarrassment referred to his poverty-stricken condition, didn't it?

Mr. Connor: What is the date of that letter?

The Court: Is that supposed to be his interpretation?

Mr. Owen: I am asking this witness if he was familiar with the fact that Stadtfeld——

The Court: Whose letter is that?

Mr. Owen: It is a letter of Stadtfeld to him.



(Testimony of Harry V. Payne.)

The Court: You are asking for his interpretation.

Mr. Connor: That is why I wanted the date.

The Court: I will sustain the objection.

Mr. Connor: I will object to it. I do not know what letter it was.

Mr. Owen: I will ask the witness this question: Did you know Stadtfeld's financial condition at the time you were dealing with him and subsequently?

Mr. Connor: I object to that as not proper cross-examination, [201] immaterial, irrelevant, and incompetent, what his financial condition was.

The Court: It would be hearsay, wouldn't it?

Mr. Connor: Certainly it would be hearsay.

The Court: I will sustain the objection.

Mr. Owen: That is all.

Mr. Connor: That is all, Mr. Payne.

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Mr. Connor: Before proceeding further, while it is on my mind might I ask the Court, interrogatories have been propounded by both sides and answers on both sides have been filed in the case. Is it the rule of this Court that those are now part of the record, or that they must be introduced in evidence?

The Court: It is up to you to decide whether you want to introduce them. I have no objection; if you feel that they should be more than referred to you

can do so, but I think the very fact that you refer to the fact that you wish them in evidence is sufficient.

Mr. Connor: I would like to have them in evidence.

The Court: In other words, what I want to know is what I am supposed to take into consideration. It is not for me to go searching for anything else. If you will note that interrogatories are being placed by you in evidence at this time then I will know they are before me.

Mr. Connor: I will ask that the two sets of interrogatories propounded by defendant to plaintiff and plaintiff's answers thereto be considered in evidence and before the Court.

The Court: You are offering them before the Court?

Mr. Connor: Yes.

The Court: They will be received.

Mr. Owen: I make the same request with respect to the interog- [202] atories presented by the plaintiff to the defendant.

The Court: They will be received, also. Are there two sets in each case?

Mr. Owen: I will have to look at my file.

The Court: The only reason I want to know is so that I will have a full statement here.

Mr. Connor: My recollection is *there only* one set by plaintiff.

The Court: I do that as a matter of precaution, because if there were two I would not know which one you were offering. I wanted to have it complete.

Mr. Owen: I believe that is correct, that the plaintiff has but one set, but let me say, if there is any mistake, I offer all of plaintiff's interrogatories and defendant's answers to plaintiff's interrogatories.

Mr. Connor: Counsel, I understand that you are standing upon the date of the application for the patent in suit as the date of the invention?

Mr. Owen: On the basis of any of the alleged prior uses testified to so far and on the basis of any of the art set up by way of anticipation.

Mr. Connor: On your prima facie case you made no effort to go back of the date of the application for patent, and my assumption naturally is that it would be part of your prima facie case to prove invention prior to that if you were seeking to extend it. I wanted to make it clear to the court.

Mr. Owen: There has been no defense put forward that requires us to go back by way of anticipation.

Mr. Connor: Then at this time you stand on the basis of the date of the application as the date of the invention? [203]

Mr. Owen: Yes.

